



DEPARTMENT OF LABOR

**Employee Benefits Security Administration**

**[Application Number D-11681]**

**ZRIN 1210-ZA18**

**Amendments to Class Prohibited Transaction Exemptions to Remove Credit**

**Ratings Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection**

**Act**

**AGENCY:** Employee Benefits Security Administration, U.S. Department of Labor.

**ACTION:** Notice of amendments to class exemptions.

**SUMMARY:** This document amends six class exemptions from prohibited transaction rules set forth in the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and the Internal Revenue Code (the Code). The amended exemptions are Prohibited Transaction Exemptions (PTEs) 75-1, 80-83, 81-8, 95-60, 97-41 and 2006-16. The amendments relate to the use of credit ratings as conditions in these class exemptions. Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the Department to remove any references to or requirements of reliance on credit ratings from its class exemptions and to substitute standards of creditworthiness as the Department determines to be appropriate. The amendments affect participants and beneficiaries of employee benefit plans, owners of individual retirement accounts (IRAs), fiduciaries of employee benefit plans and IRAs, and the financial institutions that engage in transactions with, or provide services or products to, the plans and IRAs.

**DATES:** This amendment will be in effect on **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Susan Wilker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693-8540 (this is not a toll-free number).

## **SUPPLEMENTARY INFORMATION:**

### Executive Order 12866 and 13563 Statement

Under Executive Orders 12866 and 13563, the Department must determine whether a regulatory action is “significant” and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal agencies to develop a plan under which the agencies will periodically review their existing significant regulations to make the agencies’ regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, “significant” regulatory actions are subject to the requirements of the Executive Order and review by OMB. Section 3(f) of Executive Order 12866, defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as an “economically significant action”); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

In 2013, OMB determined that the proposal was significant within the meaning of section 3(f)(4) of the Executive Order. However, since then other regulators have adopted similar changes to their regulations and financial institutions have been complying with updated credit quality standards. Therefore, pursuant to the terms of the Executive Order, it has been determined that this action is not “significant” within the meaning of section 3(f) of the Executive Order and therefore is not subject to review by OMB. This action also does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

## **Background**

In the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress included provisions designed to reduce federal regulatory reliance on credit ratings, finding that in the financial crisis of 2008 certain credit ratings had been inaccurate, and that they “contributed significantly to the mismanagement of risks by financial institutions and investors, which in turn adversely impacted the health of the economy in the United States and around the world.”<sup>1</sup> Thus, Dodd-Frank required federal agencies, including the Department, to review any regulation that referenced or required credit ratings, and to remove the references or requirements and substitute standards of creditworthiness as the agency deemed appropriate.<sup>2</sup>

As part of its compliance with Dodd-Frank, the Department conducted a review of its administrative class prohibited transaction exemptions.

In the absence of an exemption, ERISA and the Code prohibit certain transactions involving employee benefit plans and IRAs. Class exemptions granted by the Department provide prohibited transaction relief that is broadly available to any party that can satisfy its conditions and definitional provisions. Under the authority provided in ERISA section

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act section 931(5), Pub. L. 111-203, 124 Stat. 1376 (2010).

<sup>2</sup> Id., section 939A.

408(a), the Department may grant such exemptions, provided the Secretary of Labor (the “Secretary”) finds that the exemptions are (i) administratively feasible, (ii) in the interests of plans and IRAs, and their participants and beneficiaries, and (iii) protective of the rights of participants and beneficiaries of plans and IRAs.<sup>3</sup>

The Department’s review of its class exemptions determined that PTEs 75-1, Parts III & IV,<sup>4</sup> 80-83,<sup>5</sup> 81-8,<sup>6</sup> 95-60,<sup>7</sup> 97-41,<sup>8</sup> and 2006-16<sup>9</sup> (collectively, the “Class Exemptions”) include references to, or require reliance on, credit ratings. Each Class Exemption provides relief for a transaction involving a financial instrument, and in each of the Class Exemptions, the Department conditioned exemptive relief on the financial instrument, or its issuer, receiving a specified minimum credit rating. The credit ratings conditions were part of the exemption safeguards designed to protect the interests of affected plans, participants and beneficiaries, and IRAs.

The credit ratings conditions in the Class Exemptions range from requiring a rating in one of the four highest generic categories of credit ratings (i.e., an “investment grade” rating) to requiring a rating in one of the two highest generic categories of credit ratings from a nationally recognized statistical rating organization (NRSRO). In this regard, PTEs 75-1 and 80-83, which provide exemptions for securities transactions with plans and IRAs, required any non-convertible debt securities involved in a transaction to be rated in “one of the four highest rating categories from a nationally recognized statistical rating organization[.]” PTE 81-8 required commercial paper sold to plans or IRAs to possess a rating in “one of the three highest rating categories by at least one

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<sup>3</sup> Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor.

<sup>4</sup> 40 FR 50845 (October 31, 1975) as amended by 71 FR 5883 (February 3, 2006).

<sup>5</sup> 45 FR 73189 (November 4, 1980).

<sup>6</sup> 46 FR 7511 (January 23, 1981), as amended by 50 FR 14043 (April 9, 1985).

<sup>7</sup> 60 FR 35925 (July 12, 1995).

<sup>8</sup> 62 FR 42830 (August 8, 1997).

<sup>9</sup> 71 FR 63786 (October 31, 2006).

nationally recognized statistical rating service.” PTE 2006-16, which applies to securities lending transactions, included the following credit ratings requirements applicable to the loan’s collateral: for letters of credit, the issuer must receive a credit rating of at least “investment grade,” while foreign sovereign debt securities must be rated in “one of the two highest rating categories.”<sup>10</sup> PTEs 95-60 and 97-41 do not require specific credit ratings, but instead refer generally to the credit ratings of certain financial instruments.

Following its review of the Class Exemptions, the Department proposed to amend them to remove references to and requirements to rely on credit ratings as required by Dodd-Frank.<sup>11</sup> In drafting the amendments to the Class Exemptions, the Department reviewed other agencies’ methods of compliance with Dodd-Frank’s required removal of references to credit ratings. The Department focused on the Securities and Exchange Commission’s (SEC’s) amended Investment Company Act rules 6a-5, 10f-3, 2a-7, and 5b-3.<sup>12</sup> Several requirements under the Investment Company Act historically relied on credit ratings from nationally recognized credit rating agencies. Following Dodd-Frank, the SEC issued new rules and amended existing ones to comply with the law and protect investors from the risks of over-reliance on credit ratings. The Department believes that the alternatives described in the SEC releases discussed below are instructive in its development of appropriate alternatives for credit ratings referenced in the Class Exemptions.

This document sets forth the Department’s final amendments to the Class

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<sup>10</sup> The Department understands that “investment grade” is the common term for a credit rating in the highest four rating categories issued by a credit rating agency.

<sup>11</sup> 78 FR 37572 (June 21, 2013). The Department proposed the amendments on its own motion, pursuant to ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

<sup>12</sup> Among other things, the Investment Company Act seeks to address conflicts of interest in investment companies by requiring disclosure of material details about an investment company and placing restrictions on certain activities of registered investment companies. The Department also reviewed amendments made by the Commodity Futures Trading Commission (CFTC), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC) and the National Credit Union Administration (NCUA). However, the Department determined that the SEC amendments described in the Department’s 2013 proposal provide the most appropriate basis for amending the affected prohibited transaction class exemptions.

Exemptions. The Department is finalizing the amendments largely as proposed, with minor changes discussed below. The Department intends for the amended exemption conditions to require the same degree of credit quality the Class Exemptions required before the amendments, but without referencing or relying on credit ratings. Instead, parties relying on the exemptions must determine whether the requisite amended credit standards are satisfied. In amending the Class Exemptions, the Department has maintained the protections and safeguards that have historically been a part of the Class Exemptions. Therefore, the Secretary finds that the amended exemptions are (i) administratively feasible, (ii) in the interests of plans, their participants and beneficiaries, IRAs and IRA owners, and (iii) protective of the rights of participants and beneficiaries of plans and IRAs.

## **Description of the Proposal and Comments Received**

### The Proposal

The Department's proposal included credit standards to replace the following credit rating requirements set forth in the Class Exemptions: (i) a rating in one of the four highest rating categories from a NRSRO, or "investment grade," (ii) a rating in one of the three highest rating categories by at least one NRSRO, and (iii) a rating in one of the two highest rating categories by at least one NRSRO. In its proposal, the Department relied on the approaches taken by the SEC in several rules issued under the Investment Company Act. The Department proposed to replace the requirement in each of PTE 75-1, Part III, Part IV, PTE 80-83 and PTE 2016-06 for a security to be "investment grade" or in one of the four highest rating categories from a NRSRO with a new standard requiring the securities to be (i) subject to no greater than moderate credit risk and (ii) sufficiently liquid that such securities can be sold at or near their fair market value within a reasonably short period of time. This amendment was based on the SEC's adoption of rule 6a-5 and amendment to rule 10f-3 under the Investment Company Act. In replacing

the reference to credit ratings, the SEC stated that the standards aimed to ensure the securities are “sufficiently high credit quality that they are likely to maintain a fairly stable market value and may be liquidated easily. . . .”<sup>13</sup> In establishing the new standard, the SEC explained that “[m]oderate credit risk would denote current low expectations of default risk associated with the security, with an adequate capacity for payment by the issuer of principal and interest.”<sup>14</sup> The SEC made clear that NRSRO ratings may be relevant to these considerations, even though they cannot be relied upon solely.<sup>15</sup>

For PTE 81-8, the Department proposed to substitute “subject to a minimal or low amount of credit risk and (ii) sufficiently liquid that such securities can be sold at or near their fair market value within a reasonably short period of time” for a credit rating in one of the three highest rating categories. This proposal also was based on Rule 10f-3 under the Investment Company Act, which also required certain securities be rated in one of the *three* highest ratings from an NRSRO.<sup>16</sup> The SEC amended this rule to replace the credit ratings reference with a requirement that these less seasoned securities be “sufficiently liquid that they can be sold at or near their carrying value within a reasonably short period of time” and “subject to a minimal or low amount of credit risk.”<sup>17</sup> In its final amendment, the SEC explained that securities with a minimal or low amount of credit risk “would be less susceptible to default risk (*i.e.*, have a low risk of default) than those with moderate credit risk. These securities (or their issuers) also would demonstrate a strong capacity for principal and interest payments and present above average creditworthiness relative to other municipal or tax-exempt issues (or issuers).”<sup>18</sup>

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<sup>13</sup> 77 FR 70117, 70118 (November 23, 2012).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (“In making their credit quality determinations, a BIDCO’s [Business and Industrial Development Corporation] board of directors or members (or its or their delegate) can also consider credit quality reports prepared by outside sources, including NRSRO ratings, that the BIDCO board or members conclude are credible and reliable for this purpose.”)

<sup>16</sup> See 44 FR 36153 (June 29, 1979).

<sup>17</sup> 73 FR 40124, 40130 (July 11, 2008).

<sup>18</sup> 74 FR 52358, 52364 (October 9, 2009).

PTE 2006-16 required foreign sovereign debt securities for foreign collateral used in securities lending transactions to be rated in one of the two highest categories of at least one NRSRO. The Department proposed to replace this requirement in PTE 2006-16 Section V(f)(4) with a requirement that the security be “subject to a minimal amount of credit risk and (ii) sufficiently liquid that such securities can be sold at or near their fair market value in the ordinary course of business within seven calendar days.” The minimal credit risk standard was based on the SEC’s rule 2a-7, which applies to money market funds.<sup>19</sup> Before the credit rating reform amendment, rule 2a-7 limited money market funds to investing in debt obligations that, at the time of acquisition, qualified as “eligible securities.” The definition of “eligible securities” required an NRSRO rating in one of the two highest short-term rating categories. Rule 2a-7 distinguished between first tier securities (ones that the board of directors determined had the highest capacity to meet their short-term financial obligations) and second tier securities (all eligible securities that did not qualify as first tier securities).<sup>20</sup> In its final amendment, the SEC required that the fund’s board determine the security presents “minimal credit risks” and codified certain factors that the board should consider in making this determination. As amended, the fund’s board of directors must determine the security presents “minimal credit risks.” This determination must include an analysis of the security’s issuer or guarantor’s capacity to meet its financial obligations, based on its:

(A) Financial condition;

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<sup>19</sup> Investment Company Act rule 2a-7 allows money market funds to use special valuation and pricing procedures that help the fund maintain a stable net asset value per share (typically \$1.00). 17 CFR 270.2a-7(a)(11)(i).

<sup>20</sup> See 56 FR 8113, 8125 (February 27, 1991) (adopting rule 2a-7 sections (a)(6) & (a)(14)). The SEC’s 2011 proposal would have maintained this distinction between first and second tier securities, but a number of commenters objected. See 79 FR 47986, 47988-89 (August 14, 2014) (describing 2011 proposal). In re-proposing the amendment in 2014, the SEC proposed to combine these into a single standard that would require all eligible securities to present “minimal credit risks,” and the fund’s board of directors to find that the security’s issuer has an “exceptionally strong capacity to meet its short-term financial obligations.” *Id.* at 47989 and 48013. Commenters raised concerns with this proposed standard too, asserting that an “exceptionally strong capacity” could create an unclear standard for determining eligible securities. 80 FR 58124, 58127-28 (September 25, 2015).



(B) Sources of liquidity;

(C) Ability to react to future market-wide and issuer- or guarantor-specific events, including ability to repay debt in a highly adverse situation; and

(D) Strength of the issuer or guarantor's industry within the economy and relative to economic trends, and issuer or guarantor's competitive position within its industry.

In the preamble, the SEC explained that most money market fund managers already considered these factors when making minimal credit risk determinations.<sup>21</sup>

The liquidity standard proposed in PTE 2006-16 Section V(f)(2) was based on SEC rule 5b-3, which allows a fund to look through repurchase agreements to the underlying collateral securities for certain counterparty limitation and diversification purposes if the collateral meets certain credit quality standards.<sup>22</sup> Before being amended under Dodd-Frank, rule 5b-3 applied to securities that, at the time of a repurchase agreement, "rated in the highest rating category by the [r]equisite NRSROs."<sup>23</sup> The SEC amended rule 5b-3 to require the fund's board of directors (or its delegate) to determine that non-governmental collateral securities be issued by an issuer that has an "exceptionally strong capacity to meet its financial obligations"<sup>24</sup> and the securities must be "sufficiently liquid that they can be sold at approximately their carrying value in the ordinary course of business within seven calendar days."<sup>25</sup> The SEC explained that the replacement standard was designed to retain a similar degree of credit quality to the highest rating category that was in the prior version of rule 5b-3.<sup>26</sup>

#### Comments Received

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<sup>21</sup> *Id.* at 58129.

<sup>22</sup> See References to Ratings of Nationally Recognized Statistical Rating Organizations: A Small Entity Compliance Guide, Feb. 4, 2014, available at <https://www.sec.gov/info/smallbus/secg/5b-3-small-entity-compliance-guide.htm>

<sup>23</sup> 66 FR 36156, 36161 (July 11, 2001)

<sup>24</sup> 79 FR 1316, 1329 (January 8, 2014) (amending 17 CFR 270.5b-3(c)(1)(iv)(C)(1)).

<sup>25</sup> *Id.* at 1329, (amending 17 CFR 270.5b-3(c)(1)(iv)(C)(2)).

<sup>26</sup> See References to Ratings of Nationally Recognized Statistical Rating Organizations: A Small Entity Compliance Guide, Feb. 4, 2014, available at <https://www.sec.gov/info/smallbus/secg/5b-3-small-entity-compliance-guide.htm>

The Department received three comments in response to its 2013 proposal. The comments were generally supportive of the Department's approach in light of the Dodd-Frank requirement to remove credit ratings references and requirements, and commenters did not suggest specific changes to the language of the amendments. Because the Department had relied on the SEC's proposed amendment to rules 2a-7 and 5b-3 (which had not been finalized at the time of the proposal), two commenters asked the Department to wait to finalize its proposal until the SEC finalized all of its proposals. One commenter had already submitted comments to the SEC on its proposed amendment to rule 2a-7 and urged the Department to wait until the SEC addressed issues raised in those comments before finalizing its amendments that are based on the proposal. Since the Department issued its 2013 proposal, the SEC finalized its Dodd-Frank amendments to rules 2a-7<sup>27</sup> in 2015 and 5b-3 in 2014.<sup>28</sup>

One comment included a general discussion on the usefulness of credit ratings, recommending that policy-makers acknowledge that credit ratings are one input to the investment analysis process, but one with value for investors.

Commenters asked the Department to provide additional guidance on how to comply with the amended exemptions. One commenter was concerned that plan fiduciaries may not be able to analyze credit quality on their own and recommended that the Department suggest certain financial ratios to help guide fiduciaries' analyses.<sup>29</sup>

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<sup>27</sup> 80 FR 58124 (September 25, 2015). The SEC first re-proposed amendments to rule 2a-7. 79 FR 47986 (August 14, 2014). Under the new proposal, the fund's board of directors would be required to determine that any eligible security presented minimal credit risks, and that determination was required to include a finding that the security's issuer has an "exceptionally strong capacity to meet its short-term financial obligations." (79 FR at 447989 and 48013.) Commenters raised concerns with this standard too, maintaining that an "exceptionally strong capacity" could create an unclear standard for determining eligible securities. (80 FR at 58127-28.) In its final amendment, the SEC required the board to determine that the security presents "minimal credit risks," and codified certain factors relevant to money market funds the board of directors should consider in making this determination. (17 CFR 270.2a-7(a)(11)(i).)

<sup>28</sup> 79 FR 1316 (January 8, 2014).

<sup>29</sup> Fiduciary Counselors, comment letter submitted August 15, 2013. Available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA18/00001.pdf> (recommending credit ratios such as Standard & Poor's Funds from Operations/Debt, Debt/Earnings Before Interests, Taxes, Interest, Depreciation and Amortization, and

Another commenter specifically asked the Department to include a definition of “minimal credit risk” in its amendment to PTE 2006-16 Section V(f)(2). According to the commenter, the proposed language that the issuer “has a strong ability to repay its debt obligations” or a “very low vulnerability to default” was subjective, and fiduciaries would need additional information to determine if they were satisfying this condition.

#### Reopening the Comment Period

On June 24, 2021, the Department published a notice in the *Federal Register* reopening the comment period for its 2013 Dodd-Frank amendments.<sup>30</sup> The Department reopened the comment period due to the passage of time since the 2013 Proposal was published and solicited comments on all aspects of the 2013 Proposal to provide all interested parties with an opportunity to provide comments or new information. In the notice, the Department specifically sought comments regarding the following questions:

- Are changes to the 2013 Proposal’s standards of creditworthiness necessary as a result of the SEC’s finalization of amendments to Rules 2a–7 and 5b–3?
- Are changes to the 2013 Proposal’s standards of creditworthiness necessary as a result of other regulators’ actions removing references to credit ratings? For example, should the Department incorporate OCC, Federal Reserve Board, FDIC and/or NCUA standards developed for depository institutions? Have other regulators developed standards the Department should incorporate into the Class Exemptions? Are there particular challenges in the ERISA context to implementing any of those standards?
- Are changes to the 2013 Proposal’s standards of creditworthiness necessary in light of business or other economic developments since the Department

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Debt/Capital). In addition, this commenter requested guidance on whether plan fiduciaries can rely on credit ratings in contexts other than the Class Exemptions, such as to satisfy its general fiduciary obligations under ERISA section 404. While this request is outside the scope of this document, the Department notes that nothing in Dodd-Frank prohibits the consideration of credit ratings in other contexts.

<sup>30</sup> 86 FR 33360 (June 24, 2021).

proposed changes to the Class Exemptions in 2013?

- Should references to “fair market value” in the 2013 Proposal’s standards of creditworthiness be replaced with references to “carrying value”? If so, please explain why.
- Do commenters recommend that the Department require financial institutions to adopt policies and procedures for compliance with the standards of creditworthiness? If so, please describe the types of specific policies and procedures that would be helpful. Do financial institutions already have similar policies and procedures in place? Will 180 days provide sufficient time for financial institutions that currently do not have such policies and procedures in place to adopt them?

The Department received one comment in response to the notice reopening the comment period. Kroll Bond Rating Agency, LLC (KBRA), a rating agency registered with the SEC, submitted a comment in support of the Department implementing section 939A of Dodd-Frank. Noting that many institutional investors require the use of one or more of the largest NRSROs, KBRA stated that those guidelines are outdated, because they were written before other rating agencies existed. KBRA did not address any of the specific questions the Department asked in the notice.

## **Descriptions of Final Amendments to Class Exemptions**

### **In general**

The Department is adopting the amendments as proposed in 2013, with minor changes to address comments on the 2013 proposal, including changes the SEC made in finalizing its Dodd-Frank amendments. These final amendments will be effective 60 days after the date they are published in the *Federal Register*.

Based on the SEC’s 2011 proposed amendment to rule 2a-7, the Department’s proposed amendment to PTE 81-8 would have required the commercial paper to be

subject to minimal or low amount of credit risk “based on factors pertaining to credit quality and the issuer’s ability to meet its short-term financial obligations.” However, the SEC did not include this “based on” language in its final amendment; therefore, the Department is similarly not including it in this final amendment.<sup>31</sup> The Department notes that a fiduciary may consider a variety of factors in making a determination of credit quality. While credit ratings may no longer serve as specific exemption requirements, fiduciaries are not prohibited from using them as an element or data point to analyze credit quality. The Department also is making certain ministerial changes to the Class Exemptions to correct prior typographical errors.

The Department is not suggesting that fiduciaries consider any specific financial ratios when analyzing credit quality, as suggested by one commenter, but it notes that fiduciaries have broad discretion in evaluating investments and may choose to incorporate financial ratios into their review of investment options. The Department also declines to provide a definition of “minimal credit risk,” because fiduciaries should be able to determine whether a security satisfies this standard based its analysis of the issuer’s ability to repay its debt obligations. Fiduciaries that rely on the amended exemptions remain subject to the obligations described in ERISA section 404 such as prudence and loyalty, as well as all other conditions of the applicable Class Exemptions, including maintaining records to demonstrate compliance with exemption conditions. Fiduciaries are required to use a prudent process in evaluating whether investing in the securities is in the interests of plans and plan participants and beneficiaries and should document the processes they use to demonstrate compliance with the applicable exemption.

As stated above, these amendments to the Class Exemptions are designed to

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<sup>31</sup> The SEC proposed to amend rule 2a-7 in 2011, re-proposed a modified amendment in 2014, and finalized the amendment in 2015. 76 FR 12896 (March 9, 2011); 79 FR 47986 (August 14, 2014); 80 FR 58124 (September 25, 2015).

implement the mandate of Dodd-Frank section 939A to “remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness as each respective agency shall determine as appropriate for such regulations.” To meet this requirement, the Department has designed the amendments to retain the same degree of credit quality required under the Class Exemptions before the amendments without referencing or requiring reliance on credit ratings.

#### 1. PTE 75-1

PTE 75-1 was granted by the Department shortly after the enactment of ERISA and provides relief for certain transactions that were customary at the time between plans and broker-dealers or banks.<sup>32</sup> PTE 75-1 Part III permits a fiduciary to cause a plan or IRA to purchase securities from a member of an underwriting syndicate other than the fiduciary when the fiduciary also is a member of the syndicate. PTE 75-1 Part IV permits a plan or IRA to purchase securities in a principal transaction from a fiduciary that is a market maker with respect to the securities. The relief afforded in these exemptions is generally conditioned on, among other things, the issuer of the securities having been in continuous operation for no less than three years. The Department intends this condition to ensure that the issued securities are more predictable regarding pricing and trading volume stability than securities issued by unproven entities with shorter operating histories. However, there is an exception from the three-year rule in both exemptions if the securities have “sufficient credit quality,” which is defined in the exemptions to mean that the investment is “rated in one of the four highest rating categories by at least one nationally recognized statistical rating organization.” This language recognized that credit rating is an indication of a security’s credit quality by providing predictability on price,

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<sup>32</sup> Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 40 FR 50845 (October 31, 1975), as amended at 71 FR 5883 (February 3, 2006).

volatility, and ultimate payment of principal. Thus, any substitute for the credit rating requirement must provide the same level of protection for plans purchasing covered securities.

The Department is replacing the references to credit ratings in PTE 75-1 Part III Paragraph (c)(1) and Part IV Paragraph (a)(1) of PTE 75-1 with a requirement that, “at the time of acquisition, such securities are nonconvertible debt securities that are (i) subject to no greater than moderate credit risk and (ii) sufficiently liquid that such securities can be sold at or near their fair market value within a reasonably short period of time.” Thus, as amended, PTE 75-1, Part III(c)(1) and Part IV(a)(1) require securities to be issued by an issuer that has been in continuous operation for no less than three years, including the operations of any predecessors, unless, among other exceptions, the fiduciary directing the plan in the transaction has made a determination that the securities satisfy the amended credit standard when they are acquired. For purposes of this amendment, debt securities subject to a “moderate credit risk” should possess at least average credit-worthiness relative to other similar debt issues. Moderate credit risk denotes current low expectations of default risk, with an adequate capacity for payment of principal and interest.

The Department modeled this new standard on the SEC’s adoption of rule 6a-5 and amendment to rule 10f-3 of the Investment Company Act. As described above, rules 6a-5 and 10f-3 each set forth a standard that replaced a reference to an “investment grade” rating, which the Department understands is the same as a reference to one of the four highest rating categories issued by at least one NRSRO. The amended standard in the exemptions thus preserves the purpose of the original conditions in PTE 75-1, Part III, paragraph (c)(1) and PTE 75-1, Part IV paragraph (a)(1) that restrict fiduciaries’ acquisitions to purchases of securities of sufficiently high credit quality. Furthermore, because PTE 75-1, Part III and rule 10f-3 both involve the acquisition of securities in an

underwriting, if there is a relationship between the acquiring fund or entity and a member of the underwriting syndicate, the Department is ensuring that the credit quality standard required under each rule is similar.

The Department views the new standard as reflecting the same level of credit quality that was required before this amendment. A fiduciary making these determinations is not precluded from considering credit quality reports prepared by outside sources that the fiduciary concludes are credible and reliable for this purpose, including credit ratings prepared by credit rating agencies.

## 2. PTE 80-83

PTE 80-83 generally provides relief for a fiduciary causing a plan or IRA to purchase a security when the proceeds of the securities issuance may be used by the issuer to retire or reduce indebtedness to the fiduciary or an affiliate.<sup>33</sup> If the fiduciary of the plan knows (as defined in the exemption) that the proceeds of the issue will be used in whole or in part by the issuer of the securities to reduce or retire indebtedness owed to the fiduciary or its affiliate, the issuer must have been in continuous operation for not less than three years. However, before this amendment, the exemption had an exception if the securities were non-convertible debt securities rated in one of the four highest rating categories by at least one nationally recognized statistical rating organization.

Similar to PTE 75-1, Parts III and IV, the Department is replacing the reference to credit ratings in PTE 80-83 with a requirement that, “at the time of acquisition, such securities are non-convertible debt securities that are (i) subject to no greater than moderate credit risk and (ii) sufficiently liquid that such securities can be sold at or near their fair market value within a reasonably short period of time.”

For purposes of this amendment, debt securities subject to a moderate level of

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<sup>33</sup> Class Exemption for Certain Transactions Involving Purchase of Securities Where Issuer May Use Proceeds to Reduce or Retire Indebtedness to Parties in Interest, 45 FR 73189 (November 4, 1980), as amended at 67 FR 9483 (March 1, 2002).



credit risk should possess at least average credit-worthiness relative to other similar debt issues. Moderate credit risk denotes current low expectations of default risk, with an adequate capacity for payment of principal and interest. The Department views this new standard as requiring debt securities to have the same level of credit quality that was required before this amendment.

### 3. PTE 81-8

PTE 81-8 permits employee benefit plans to invest plan assets in certain short-term investments, including commercial paper, issued by a party in interest.<sup>34</sup> As a condition of this relief, paragraph II(D) required the commercial paper to be ranked in one of the three highest rating categories by at least one NRSRO before this amendment. This condition allowed fiduciaries who made investment decisions regarding the short-term investments of a plan to choose from a broad range of issues of commercial paper while assuring that an independent third party has assessed the quality of the issue.

The Department is amending paragraph II(D) of PTE 81-8 to delete the reference to the credit rating of commercial paper and replace it with a requirement that, “at the time of acquisition, the commercial paper is (i) subject to a minimal or low amount of credit risk and (ii) sufficiently liquid that such securities can be sold at or near their fair market value within a reasonably short period of time.” This is a higher standard than the standard replacing “investment grade” in PTEs 75-1 Parts III and IV and 80-83. Commercial paper subject to a minimal or low credit risk would have a lower risk of default than commercial paper with moderate credit risk. These instruments also would demonstrate a strong capacity for principal and interest payments and present above-average credit-worthiness relative to other issues of commercial paper. The Department views the new standard as reflecting the same level of credit quality required before this

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<sup>34</sup> Class Exemption Covering Certain Short-term Investments, 46 FR 7511 (January 23, 1981), as amended by 50 FR 14043 (April 9, 1985).

amendment. As described above, “minimal or low amount of credit risk” is an element of the SEC’s rule 10f-3 of the Investment Company Act.

The amended PTE 81-8 also relies on the SEC’s amendment to rule 2a-7, which requires a security to present “minimal credit risk” to the fund. The Department’s 2013 proposed amendment to PTE 81-8 would have required the commercial paper to be subject to minimal or low amount of credit risk “based on factors pertaining to credit quality and the issuer’s ability to meet its short-term financial obligations.” The Department modeled this language on the SEC’s 2011 proposed amendment to rule 2a-7, but the SEC did not include this “based on” language in its final amendment.<sup>35</sup> While the Department has therefore also not included these factors in its amendment to PTE 81-8, fiduciaries investing in commercial paper may choose to consult the factors described in the SEC’s proposed amendment to rule 2a-7.

The Department discussed the credit rating requirement in the preamble to the original 1981 exemption. In response to the original 1980 proposal, commenters had raised concerns that the credit ratings condition would limit the investments available to the plan and could prevent plan fiduciaries from making independent judgments about appropriate investments. In finalizing the 1981 exemption, the Department determined that the credit rating condition was an important independent safeguard, but that it was not sufficient to conclude an investment was appropriate for a plan.<sup>36</sup> While the Department can no longer require a specified credit rating, the Department reiterates its position from 1981, that “responsible plan fiduciaries, taking into account all the relevant facts and circumstances” must determine whether a specific acquisition is appropriate for the plan. For purposes of this amendment, the Department believes that a fiduciary’s

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<sup>35</sup> The SEC proposed to amend rule 2a-7 in 2011, re-proposed a modified amendment in 2014, and finalized the amendment in 2015. 76 FR 12896 (March 9, 2011); 79 FR 47986 (August 14, 2014); 80 FR 58124 (September 25, 2015).

<sup>36</sup> 46 FR 7509, 7512 (January 23, 1981)

determination of the commercial paper's credit quality according to the amended standard should, as a matter of prudence, include the reports or advice of independent third parties, including where appropriate, the commercial paper's credit rating.

#### 4. PTE 95-60

The Department originally granted PTE 95-60<sup>37</sup> in response to the Supreme Court's decision in *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank* (Harris Trust).<sup>38</sup> After the Court's decision, there was uncertainty with respect to a number of existing exemptions that had been granted for operating asset pool investment trusts that issue asset-backed, pass-through certificates to plans. Specifically, the Department had previously granted PTE 83-1<sup>39</sup> and the "Underwriter Exemptions,"<sup>40</sup> which were conditioned, among other things, on the certificates that were purchased by plans not being subordinated to other classes of certificates issued by the same trust. In a typical asset pool investment trust, one or more classes of subordinated certificates are often purchased by life insurance companies. The Supreme Court held in *Harris Trust* that insurance company general accounts may be considered "plan assets" and raised the potential that servicers and trustees of pools may be engaging in prohibited transactions for the same acts involving the operation of trusts which would be exempt if the certificates were not subordinated.

PTE 95-60 Section III provided an exemption for the operation of asset pool investment trusts if, among other things, the conditions of either PTE 83-1 or an applicable Underwriter Exemption are met, other than the requirements that the

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<sup>37</sup> Class Exemption for Certain Transactions Involving Insurance Company General Accounts, 60 FR 35925 (July 12, 1995).

<sup>38</sup> 510 US 86 (1993).

<sup>39</sup> 48 FR 895 (January 7, 1983). PTE 83-1 provides relief for the operation of certain mortgage pool investment trusts and the acquisition and holding by plans of certain mortgage-backed pass-through certificates evidencing interests therein

<sup>40</sup> The Underwriter Exemptions are comprised of a number of individual exemptions that rely on credit ratings. See, e.g., PTE 2009-31 (74 FR 59003, November 16, 2009)), amending existing exemptions which provided relief for the operation of certain asset pool investment trusts and the acquisition and holding by plans of certain asset-based pass-through certificates representing interests in those trusts. The amendment provided a six-month period to resolve certain affiliations as a result of corporate transactions.

certificates acquired by the general account not be subordinated and receive a rating that is in one of the three highest generic rating categories from an independent rating agency. The Department is amending PTE 95-60 Section III to delete this reference to credit ratings and replacing it with a general reference to the credit quality of the certificates, as required by the relevant underwriter exemption.<sup>41</sup> Thus, PTE 95-60 Section III(a)(2), as amended, provides that “[t]he conditions of either PTE 83-1 or the relevant Underwriter Exemption are met, except for the requirements that . . . the certificates acquired by the general account have the credit quality required under the relevant Underwriter Exemption at the time of such acquisition.” The Department believes that this modification will bring PTE 95-60 into compliance with Dodd-Frank without amending the Underwriter Exemptions.

#### 5. PTE 97-41

If a plan is withdrawing all of its assets from a collective investment fund (CIF) that is maintained by a bank or plan adviser, and that bank or plan adviser is both the investment adviser to the mutual fund and also a fiduciary of the plan, PTE 97-41 permits the plan to purchase shares of mutual funds in exchange for plan assets that are transferred in-kind to the mutual fund from the CIF.<sup>42</sup> The exemption generally requires

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<sup>41</sup> The term “Underwriter Exemption” refers to the following individual Prohibited Transaction Exemptions (PTEs)— PTE 89–88, 54 FR 42582 (October 17, 1989); PTE 89–89, 54 FR 42569 (October 17, 1989); PTE 89–90, 54 FR 42597 (October 17, 1989); PTE 90–22, 55 FR 20542 (May 17, 1990); PTE 90–23, 55 FR 20545 (May 17, 1990); PTE 90–24, 55 FR 20548 (May 17, 1990); PTE 90–28, 55 FR 21456 (May 24, 1990); PTE 90–29, 55 FR 21459 (May 24, 1990); PTE 90–30, 55 FR 21461 (May 24, 1990); PTE 90–31, 55 FR 23144 (June 6, 1990); PTE 90–32, 55 FR 23147 (June 6, 1990); PTE 90–33, 55 FR 23151 (June 6, 1990); PTE 90–36, 55 FR 25903 (June 25, 1990); PTE 90–39, 55 FR 27713 (July 5, 1990); PTE 90–59, 55 FR 36724 (September 6, 1990); PTE 90–83, 55 FR 50250 (December 5, 1990); PTE 90–84, 55 FR 50252 (December 5, 1990); PTE 90–88, 55 FR 52899 (December 24, 1990); PTE 91–14, 55 FR 48178 (February 22, 1991); PTE 91–22, 56 FR 03277 (April 18, 1991); PTE 91–23, 56 FR 15936 (April 18, 1991); PTE 91–30, 56 FR 22452 (May 15, 1991); PTE 91–39, 56 FR 33473 (July 22, 1991); PTE 91–62, 56 FR 51406 (October 11, 1991); PTE 93–6, 58 FR 07255 (February 5, 1993); PTE 93–31, 58 FR 28620 (May 5, 1993); PTE 93–32, 58 FR 28623 (May 14, 1993); PTE 94–29, 59 FR 14675 (March 29, 1994); PTE 94–64, 59 FR 42312 (August 17, 1994); PTE 94–70, 59 FR 50014 (September 30, 1994); PTE 94–73, 59 FR 51213 (October 7, 1994); PTE 94–84, 59 FR 65400 (December 19, 1994); and any other exemption providing similar relief to the extent that the Department expressly determines, as part of the proceeding to grant such exemption, to include the exemption within this definition.

<sup>42</sup> Class Exemption for Collective Investment Fund Conversion Transactions 62 FR 42830 (August 8, 1997)

the transferred assets to constitute the plan's pro rata portion of the assets that were held by the CIF immediately before the transfer. However, original Section II(c) provided an exception if, among other requirements, at the time of the transfer, the securities have the same credit ratings from nationally recognized statistical rating organizations. This exception allowed plans to avoid the transaction costs involved in liquidating small positions in fixed-income securities that are not divisible or that can be divided only at substantial cost before their maturity.

The Department is amending the exemption by deleting the requirement that the securities transferred in-kind from a CIF to a mutual fund have the same credit ratings and replacing it with a requirement that the securities must be of the same credit quality. Section II(c), as amended, provides that the allocation of fixed-income securities held by a CIF among the plans on the basis of each plan's pro rata share of the aggregate value of the securities will not fail to meet the requirements of Section II(c) if, among other requirements, the "securities have the same coupon rate and maturity and at the time of transfer, the same credit quality."

In making the determination as to the credit quality of fixed income securities for purposes of this amended condition, the Department notes that a fiduciary should, to the extent possible, engage in credit quality comparisons of securities using the same standards (*e.g.*, employing the same metrics) for each set of securities. The Department believes that an "apples to apples" comparison of the credit quality of each security taking into account the same variables would satisfy the amended condition in Section II(c)(2). Furthermore, the Department notes that a fiduciary may rely on reports and advice given by independent third parties, including ratings issued by rating agencies, when making a credit quality determination.

#### 6. PTE 2006-16

PTE 2006-16 permits lending securities that are employee benefit plan assets to

certain banks and broker-dealers that are parties in interest to the plan.<sup>43</sup> Specific conditions apply to “Foreign Collateral.” Under Section V(f)(2) Foreign Collateral included “foreign sovereign debt securities provided that at least one nationally recognized statistical rating organization has rated in one of its two highest categories either the issue, the issuer or guarantor.” Under Section V(f)(4) Foreign Collateral included “irrevocable letters of credit issued by a Foreign Bank, other than the borrower or an affiliate thereof, which has a counterparty rating of investment grade or better as determined by a nationally recognized statistical rating organization.”

The Department is amending Section V(f)(4) to delete the reference to credit ratings and provide that “Foreign Collateral” will include “irrevocable letters of credit issued by a Foreign Bank, other than the borrower or an affiliate thereof, provided that, at the time the letters of credit are issued, the Foreign Bank’s ability to honor its commitments thereunder is subject to no greater than moderate credit risk.” To satisfy this credit risk requirement, a Foreign Bank would demonstrate at least average credit-worthiness relative to other issuers of similar debt. Moderate credit risk would denote current low expectations of default risk, with an adequate capacity for payment of principal and interest.

In amending Section V(f)(4), the Department is relying on the SEC rule 6a-5. As described above, rule 6a-5 relies on the issuing bank’s ability to honor its commitment under the letter of credit, and was designed to reflect the same level of credit quality as the credit ratings they replaced in the Investment Company Act, similar to the “investment grade” standard being replaced in Section V(f)(4) of PTE 2006-16.

The Department is amending Section V(f)(2) to delete the reference to credit ratings and provide that “Foreign Collateral” will include foreign sovereign debt

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<sup>43</sup> Class Exemption To Permit Certain Loans of Securities by Employee Benefit Plans 71 FR 63786 (October 31, 2006).

securities that are “(i) subject to a minimal amount of credit risk, and (ii) sufficiently liquid that such securities can be sold at or near their fair market value in the ordinary course of business within seven calendar days.” To satisfy this credit-worthiness requirement the foreign sovereign debt security should have a very strong ability to repay its debt obligations, and a very low vulnerability to default.

In making this amendment, the Department is relying on SEC’s amendment to rules 2a-7 and 5b-3. The amendment to rule 2a-7 governs the securities that certain money market funds may hold as investments. Despite the request in the public comments to define “minimal credit risk,” the Department is not adding a definition of such term to the exemption text. The Department believes that the “minimal credit risk” standard in rule 2a-7 is an appropriate model for the alternative standard of credit quality in Section V(f)(2), as both provisions reflect credit ratings in one of the two highest rating categories. However, while rule 2a-7 is limited to short-term securities, foreign sovereign debt securities described in Section V(f)(2) could be either long-term or short-term securities. Therefore, the Department did not include the SEC’s language from rule 2a-7 describing the factors to consider. In the case of a short-term foreign sovereign debt security, fiduciaries may wish to consider the issuer’s ability to meet its short-term obligations and the factors discussed by the SEC in rule 2a-7 in evaluating the security’s credit quality.

The Department’s approach also relies on SEC rule 5b-3 which relates to funds entering into repurchase agreements that are collateralized with certain high credit-quality securities. The Department believes that the economic considerations and regulatory framework underpinning securities repurchase agreements is similar to that for securities lending transactions. Thus, the liquidity requirement in amended rule 5b-3 (“sufficiently liquid” that the securities “can be sold at approximately their carrying value in the ordinary course of business within seven calendar days”) is appropriate for the alternative

standard of credit quality in PTE 2006-16, Section V(f)(2). The Department has determined that the credit risk associated with this new language would differ only slightly from the prior language requiring highest credit quality.

Regarding Sections V(f)(2) and V(f)(4) of PTE 2006-16, the Department notes that lending fiduciaries making determinations of credit quality retain the ability after the amendment to consider credit quality determinations prepared by outside sources, including credit ratings issued by rating organizations that fiduciaries conclude are credible and reliable in making determinations of credit worthiness.

### **Paperwork Reduction Act**

According to the Paperwork Reduction Act of 1995 (Pub. L. 104–13) (the PRA), no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. See 44 U.S.C. 3507. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. *See* 44 U.S.C. 3512.

The Department has not made a submission to OMB at this time, because the final amendments do not revise the information collection requests contained in the following PTEs: PTE 75-1, which currently is approved by OMB under OMB Control Number 1210-0092 until August 31, 2022; PTE 80-83, which currently is approved by OMB under OMB Control Number 1210-0064 until January 31, 2023; PTE 81-8, which currently is approved by OMB under OMB Control Number 1210-0061 until January 31, 2024; PTE 95-60, which currently is approved by OMB under OMB Control Number



1210-0114 until November 30, 2024; PTE 97-41, which is approved by OMB under OMB Control Number 1210-0104 until April 30, 2022; and PTE 2006-16, which currently is approved by OMB under OMB Control Number 1210-0065 until October 31, 2022.

### **General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary, or other party in interest or disqualified person with respect to a plan, from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary act prudently and discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of Code section 401(a) that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) The Department finds that the exemptions, as amended, are administratively feasible, in the interests of plans, their participants and beneficiaries, IRAs and IRA owners, and protective of the rights of participants and beneficiaries of plans and IRAs;

(3) The exemptions, as amended, are applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The exemptions, as amended, are supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

The Department has republished the entire text of the amended PTEs for the convenience of readers. The Department does not intend to make any substantive changes to the PTEs by republishing the full text of the PTEs in this *Federal Register* notice other than the credit rating amendments.

PTE 75-1

Part III is amended to read as follows:

The restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1954 (the Code), by reason of section 4975(c)(1) of the Code, shall not apply to the purchase or other acquisition of any securities by an employee benefit plan during the existence of an underwriting or selling syndicate with respect to such securities, from any person other than a fiduciary with respect to the plan, when such a fiduciary is a member of such syndicate, provided that the following conditions are met:

(a) No fiduciary who is involved in any way in causing the plan to make the purchase is a manager of such underwriting or selling syndicate, except that this paragraph shall not apply until July 1, 1977. For purposes of this exemption, the term “manager” means any member of an underwriting or selling syndicate, who, either alone or together with other members of the syndicate, is authorized to act on behalf of the members of the syndicate in connection with the sale and distribution of the securities being offered or who receives compensation from the members of the syndicate for its services as a manager of the syndicate.

(b) The securities to be purchased or otherwise acquired are—

(1) Part of an issue registered under the Securities Act of 1933 or, if exempt from such registration requirement, are (i) issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States, (ii) issued by a bank,

(iii) issued by a common or contract carrier, if such issuance is subject to the provisions of section 20a of the Interstate Commerce Act, as amended, (iv) exempt from such registration requirement pursuant to a Federal statute other than the Securities Act of 1933, or (v) are the subject of a distribution and are of a class which is required to be registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), and the issuer of which has been subject to the reporting requirements of section 13 of that Act (15 U.S.C. 78m) for a period of at least 90 days immediately preceding the sale of securities and has filed all reports required to be filed thereunder with the Securities and Exchange Commission during the preceding 12 months.

(2) Purchased at not more than the public offering price prior to the end of the first full business day after the final terms of the securities have been fixed and announced to the public, except that:

(i) If such securities are offered for subscription upon exercise of rights, they are purchased on or before the fourth day preceding the day on which the rights offering terminates; or

(ii) If such securities are debt securities, they may be purchased at a public offering price on a day subsequent to the end of such first full business day, provided that the interest rates on comparable debt securities offered to the public subsequent to such first full business day and prior to the purchase are less than the interest rate of the debt securities being purchased.

(3) Offered pursuant to an underwriting agreement under which the members of the syndicate are committed to purchase all of the securities being offered, except if—

(i) Such securities are purchased by others pursuant to a rights offering; or

(ii) Such securities are offered pursuant to an over-allotment option.

(c) The issuer of such securities has been in continuous operation for not less than three years, including the operations of any predecessors, unless—

(1) Effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, at the time of acquisition, such securities are nonconvertible debt securities that are (i) subject to no greater than moderate credit risk and (ii) sufficiently liquid that such securities can be sold at or near their fair market value within a reasonably short period of time;

(2) Such securities are issued or fully guaranteed by a person described in paragraph (b)(1)(i) of this exemption; or

(3) Such securities are fully guaranteed by a person who has issued securities described in in paragraph (b)(1)(ii), (iii), (iv) or (v) and this paragraph (c).

(d) The amount of such securities to be purchased or otherwise acquired by the plan does not exceed three percent of the total amount of such securities being offered.

(e) The consideration to be paid by the plan in purchasing or otherwise acquiring such securities does not exceed three percent of the fair market value of the total assets of the plan as of the last day of the most recent fiscal quarter of the plan prior to such transaction, provided that if such consideration exceeds \$1 million, it does not exceed one percent of such fair market value of the total assets of the plan.

(f) The plan maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (g) of this exemption to determine whether the conditions of this exemption have been met, except that a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the plan fiduciaries, such records are lost or destroyed prior to the end of such six-year period.

(g) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (f) are unconditionally available for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and

beneficiaries, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan.

If such securities are purchased by the plan from a party in interest or disqualified person with respect to the plan, such party in interest or disqualified person shall not be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the conditions of this exemption are not met. However, if such securities are purchased from a party in interest or disqualified person with respect to the plan, the restrictions of section 406(a) of the Act shall apply to any fiduciary with respect to the plan and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall apply to such party in interest or disqualified person, unless the conditions for exemption of Part II of this notice (relating to certain principal transactions) are met.

For purposes of this exemption, the term “fiduciary” shall include such fiduciary and any affiliates of such fiduciary, and the term “affiliate” shall be defined in the same manner as that term is defined in 29 CFR 2510.3-21(e) and 26 CFR 54.4975-9(e).

Part IV is amended to read as follows:

The restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1954 (the Code), by reason of section 4975(c)(1) of the Code, shall not apply to any purchase or sale of any securities by an employee benefit plan from or to a market-maker with respect to such securities who is also a fiduciary with respect to such plan, provided that the following conditions are met:

(a) The issuer of such securities has been in continuous operation for not less than three years, including the operations of any predecessors, unless—

(1) Effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, at the time of acquisition, such securities are

nonconvertible debt securities that are (i) subject to no greater than moderate credit risk and (ii) sufficiently liquid that such securities can be sold at or near their fair market value within a reasonably short period of time;

(2) Such securities are issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States, or

(3) Such securities are fully guaranteed by a person described in this paragraph

(a).

(b) As a result of purchasing such securities—

(1) The fair market value of the aggregate amount of such securities owned, directly or indirectly, by the plan and with respect to which such fiduciary is a fiduciary, does not exceed three percent of the fair market value of the assets of the plan with respect to which such fiduciary is a fiduciary, as of the last day of the most recent fiscal quarter of the plan prior to such transaction, provided that if the fair market value of such securities exceeds \$1 million, it does not exceed one percent of such fair market value of such assets of the plan, except that this paragraph shall not apply to securities described in paragraph (a)(2) of this exemption; and

(2) The fair market value of the aggregate amount of all securities for which such fiduciary is a market-maker, which are owned, directly or indirectly, by the plan and with respect to which such fiduciary is a fiduciary, does not exceed 10 percent of the fair market value of the assets of the plan with respect to which such fiduciary is a fiduciary, as of the last day of the most recent fiscal quarter of the plan prior to such transaction, except that this paragraph shall not apply to securities described in paragraph (a)(2) of this exemption.

(c) At least one person other than such fiduciary is a market-maker with respect to such securities.

(d) The transaction is executed at a net price to the plan for the number of shares or other units to be purchased or sold in the transaction which is more favorable to the plan than that which such fiduciary, acting in good faith, reasonably believes to be available at the time of such transaction from all other market-makers with respect to such securities.

(e) The plan maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (f) of this exemption to determine whether the conditions of this exemption have been met, except that a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the plan fiduciaries, such records are lost or destroyed prior to the end of such six year period.

(f) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (e) are unconditionally available for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan.

For purposes of this exemption—

(1) The term “market-maker” shall mean any specialist permitted to act as a dealer, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.

(2) The term “fiduciary” shall include such fiduciary and any affiliates of such fiduciary, and the term “affiliate” shall be defined in the same manner as that term is defined in 29 CFR 2510.3-21(e) and 26 CFR 54.4975-9(e).

PTE 80-83 is amended to read as follows:

*I. Transactions*

A. Effective January 1, 1975 the restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the purchase or other acquisition prior to December 1, 1980 in a public offering (defined in Section II(B)) of securities by a fiduciary on behalf of an employee benefit plan solely because the proceeds from the sale were or were to be used by the issuer of the securities to retire or reduce indebtedness owed to a party in interest with respect to the plan other than the fiduciary, *provided that* the price paid by the plan for the securities does not exceed adequate consideration as defined in section 3(18) of the Act.

B. Subject to the conditions described in section II(A), effective December 1, 1980, the restrictions of sections 406(a)(1)(A) through (D) of the Act and the taxes imposed by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the purchase or other acquisition in a public offering (defined in section II(B)) of securities by a fiduciary on behalf of an employee benefit plan solely because the proceeds from the sale may be used by the issuer of the securities to retire or reduce indebtedness owed to a party in interest of the plan other than the fiduciary.

C. Subject to conditions described in section II(A), effective January 1, 1975, the restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (2) of the Act and the taxes imposed by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the purchase or other acquisition in a public offering (defined in section II(B)) of securities by a fiduciary, which is a bank or an affiliate thereof, on behalf of an employee benefit plan solely because the proceeds from the sale may be used by the issuer of the securities to retire or reduce indebtedness owed to such fiduciary or any affiliate thereof, provided that, if such fiduciary of the plan knows (as defined in paragraph 7) that the



proceeds of this issue will be used in whole or in part by the issuer of the securities to reduce or retire indebtedness owed to such fiduciary or affiliate thereof, the transaction shall have complied with the conditions set forth in paragraph 1 through 6 below:

1. Such securities are purchased prior to the end of the first full business day after the securities have been offered to the public, except that—

a. If such securities are offered for subscription upon exercise of rights, they may be purchased on or before the fourth day preceding the day on which the rights offering terminates; or

b. If such securities are debt securities, they may be purchased on a day subsequent to the end of such first full business day, if the effective interest rates on comparable debt securities offered to the public subsequent to such first full business day and prior to the purchase are less than effective interest rate of the debt securities being purchased;

2. Such securities are offered by the issuer pursuant to an underwriting agreement under which the members of the underwriting syndicate are committed to purchase all of the securities being offered, except if the securities

a. Are purchased by others pursuant to a rights offering, or

b. Are offered pursuant to an overallotment option;

3. Effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the issuer of such securities has been in continuous operation for not less than three years, including the operations of any predecessors, unless at the time of acquisition, such securities are nonconvertible debt securities that are (i) subject to no greater than moderate credit risk and (ii) sufficiently liquid that such securities can be sold at or near their fair market value within a reasonably short period of time;

4. The amount of securities purchased or otherwise acquired on behalf of the plan

by the fiduciary does not exceed three percent of the total amount of the securities being offered;

5. The consideration to be paid by any plan in purchasing or otherwise acquiring such securities does not exceed three percent of the fair market value, as of the most recent valuation date of the plan prior to such transaction, of the plan assets which are subject to the management and control of such fiduciary;

6. The total amount of securities in any single offering purchased by the fiduciary on behalf of the plan together with the total amount of such securities purchased by such fiduciary acting as a fiduciary on behalf of any other employee benefit plan subject to Title I of the Act does not exceed 10 percent of the amount of the offering;

7. As used in this section I(C), a fiduciary will be deemed to know that the proceeds of an issuance of securities will be used in whole or in part by the issuer of the securities to reduce or retire indebtedness owed to such fiduciary or an affiliate thereof, if

a. Such knowledge is actually communicated to, or

b. Information reasonably sufficient to cause belief that the proceeds will be used in whole or in part by the issuer of the securities to reduce or retire indebtedness owed to the fiduciary, or an affiliate thereof, is possessed by, the officers or employees of the fiduciary, who are authorized to be involved in carrying out the investment responsibilities, obligations, or duties of the fiduciary, or who in fact are involved in carrying out such responsibilities, obligations, or duties, regarding the purchase or other acquisition.

D. Effective January 1, 1975, the restrictions of sections 406(a)(1)(A) through (D) and 406(b)(1) and (2) of the Act and the taxes imposed by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the receipt by a party in interest of any of the proceeds resulting from the issuance, in a public offering (as defined in section II(B)), of securities merely because such proceeds are used by the issuer of the

securities to retire or reduce indebtedness owed to the party in interest provided that, when such party in interest is a fiduciary acquiring such securities on behalf of a plan, such fiduciary is a bank or an affiliate thereof (as defined in section II(B)) which meets the provisions of section I(C) of this exemption.

## *II. General Conditions*

A. The following conditions apply to the transactions described in section I(B) and (C) above:

1. The price paid by the plan fiduciary for the securities shall not be in excess of the offering price described in an effective registration statement under the Securities Act of 1933 covering such securities, or in the case of securities described in section II(B)(1)(b), in the offering circular required under applicable federal law;

2. (a) The fiduciary, on behalf of the plan, maintains for a period of six years from the date of the transaction the records necessary to enable the persons described in section II(A)(2)(b) below to determine whether the conditions of this exemption have been met, except that a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the fiduciary, the records are lost or destroyed prior to the end of the six-year period;

(b) Notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in section II(A)(2)(a) above are unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service,

(ii) Any fiduciary of a plan who has authority to manage and control the assets of the plan, or to allocate to another fiduciary the authority to manage and control the assets of the plan, or any duly authorized employee or representative of such fiduciary,

(iii) Any contributing employer to the plan or representative of such employer,

(iv) Any participant or beneficiary of the plan or any duly authorized employee or representative of such participant or beneficiary.

(v) None of the persons described in subparagraph (ii) through (iv) of this paragraph shall be authorized to examine any fiduciary's trade secrets or required to be kept commercial or financial information which is privileged or required to be kept confidential.

B. For the purposes of the exemptions contained in Part I,

1. The term "public offering" means

a. The offering of securities registered under the Securities Act of 1933

(Securities Act), or

b. The offerings of securities exempt from registration under the Securities Act which are

(i) Issued by a bank,

(ii) Issued by a motor carrier if such issuance is subject to the provisions of section 214 of the Interstate Commerce Act, as amended,

(iii) Exempt from the registration requirements of the Securities Act pursuant to a federal statute other than the Securities Act, or

(iv) The subject of a distribution and of a class which is required to be registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), and the issuer of which has been subject to the reporting requirements of section 13 of that Act (15 U.S.C. 78m) for a period of at least 90 days immediately preceding the sale of securities and has filed all reports required to be filed thereunder with the Securities and Exchange Commission during the preceding 12 months.

2. An "affiliate" of a bank means any entity directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such bank.

For the purposes of this paragraph, the term "control" means the power to

exercise a controlling influence over the management or policies of a person other than an individual.

3. Each plan participating in a collective or commingled fund shall be considered to own the same proportionate undivided interest in each asset of the collective investment fund as its proportionate interest in the total assets of the collective investment fund as calculated on the most recent preceding valuation date of the fund.

4. For purposes of this exemption, the terms “employee benefit plan” and “plan” refer to an employee benefit plan described in section 3(3) of ERISA and/or a plan described in section 4975(e)(1) of the Code.

#### PTE 81-8

PTE 81-8 is amended to read as follows: Effective January 1, 1975, the restrictions of sections 406(a)(1)(A), (B) and (D) of the Act, and the taxes imposed by reason of section 4975(c)(1)(A), (B) and (D) of the Code shall not apply to an investment of employee benefit plan assets which involves the purchase or other acquisition, holding, sale, exchange or redemption by or on behalf of an employee benefit plan of the following:

##### *I. Banker's Acceptances.*

A banker's acceptance that is issued by a bank if:

A. The banker's acceptance has a stated maturity date of one year or less from the date of issue or has a maturity date of one year or less from the date of purchase on behalf of the plan;

B. Neither the bank nor any affiliate of the bank has discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

C. The terms of the transaction are at least as favorable to the plan as those of an arm's length transaction with an unrelated party would be; and,

D. With respect to transactions occurring on or after April 23, 1981 the bank issuing the banker's acceptance is supervised by the United States or a State.

## *II. Commercial Paper.*

Commercial paper if:

A. It is not issued by an employer any of whose employees are covered by the plan or by an affiliate of such employer;

B. It has a stated maturity date of nine months or less from the date of issue, exclusive of days of grace, or is a renewal of an issue of commercial paper the maturity of which is likewise limited;

C. Neither the issuer of the commercial paper, any guarantor of the commercial paper, nor an affiliate of such issuer or guarantor, has discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

D. With respect to an acquisition or holding of commercial paper (including an acquisition by exchange) occurring on or after **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, at the time of acquisition, the commercial paper is (i) subject to a minimal or low amount of credit risk and (ii) sufficiently liquid that such securities can be sold at or near their fair market value within a reasonably short period of time.

## *III. Repurchase Agreements.*

A repurchase agreement (or securities or other instruments under cover of a repurchase agreement) in which the seller of the underlying securities or other instruments is a bank which is supervised by the United States or a State; a broker-dealer registered under the Securities Exchange Act of 1934; or a dealer who makes primary markets in securities of the United States government or any agency thereof or in bankers acceptances and

reports daily to the Federal Reserve Bank of New York its position with respect to these obligations, if each of the following conditions are satisfied.

A. The repurchase agreement is embodied in, or is entered into pursuant to, a written agreement the terms of which are at least as favorable to the plan as an arm's length transaction with an unrelated party would be. For transactions occurring before April 23, 1981 a written confirmation of a repurchase agreement whose terms were at least as favorable to the plan as an arm's length transaction with an unrelated party will be deemed to satisfy this condition.

B. The plan receives interest at a rate no less than that which it would receive in a comparable transaction with an unrelated party.

C. The repurchase agreement has a duration of one year or less.

D. The plan receives securities, banker's acceptances, commercial paper, or certificates of deposit having a market value equal to not less than 100 percent of the purchase price paid by the plan.

E. Upon expiration of the repurchase agreement and return of the securities or other instruments to the bank, broker-dealer or dealer (seller), the seller transfers to the plan an amount equal to the purchase price plus the appropriate interest.

F. Neither the seller nor an affiliate of the seller has discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets.

G. The securities, banker's acceptances, commercial paper or certificates of deposit received by the plan—

(1) Could be acquired directly by the plan in a transaction not covered by this section III without violating sections 406(a)(1)(E), 406(a)(2) or 407(a) of the Act; and,

(2) If the securities are subject to the provisions of the Securities Act of 1933,

they are obligations that are not “restricted securities” within the meaning of Rule 144 under that act.

H. With respect to transactions occurring on or after April 23, 1981,

(1) If the market value of the underlying securities or other instruments falls below the purchase price at any time during the term of the agreement, the plan may, under the written agreement required by paragraph A of this section, require the seller to deliver, by the close of business on the following business day, additional securities or other instruments the market value of which, together with the market value of securities previously delivered or sold to the plan under the repurchase agreement, equals at least 100 percent of the purchase price paid by the plan;

(2) If the seller does not deliver additional securities or other instruments as required above, the plan may terminate the agreement, and, if upon termination or expiration of the agreement, the amount owing is not paid to the plan, the plan may sell the securities or other instruments and apply the proceeds against the obligations of the seller under the agreement, and against any expenses associated with the sale; and,

(3) The seller agrees to furnish the plan with the most recent available audited statement of its financial condition as well as its most recent available unaudited statement, agrees to furnish additional audited and unaudited statements of its financial condition as they are issued and either: (A) agrees that each repurchase agreement transaction pursuant to the agreement shall constitute a representation by the seller that there has been no material adverse change in its financial condition since the date of the last statement furnished that has not been disclosed to the plan fiduciary with whom such written agreement is made; or (B) prior to each repurchase agreement transaction, the seller represents that, as of the time the transaction is negotiated, there has been no material adverse change in its financial condition since the date of the last statement furnished that has not been disclosed to the plan fiduciary with whom such written



agreement is made.

(4) In the event of termination and sale as described in (2) above, the seller pays to the plan the amount of any remaining obligations and expenses not covered by the sale of the securities or other instruments, plus interest at a reasonable rate.

If a seller involved in a repurchase agreement covered by this exemption fails to comply with any condition of this exemption in the course of engaging in the repurchase agreement, the plan fiduciary who caused the plan to engage in such repurchase agreement shall not be deemed to have caused the plan to engage in a transaction prohibited by section 406(a)(1)(A) through (D) of the Act solely by reason of the seller's failure to comply with the conditions of the exemption.

#### *IV. Certificates of Deposit.*

A certificate of deposit that is issued by a bank which is supervised by the United States or a State if neither the bank nor any affiliate of the bank has discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets.

#### *V. Securities of Banks.*

A security issued by a bank or an affiliate of the bank if:

- A. The bank is supervised by the United States or a State;
- B. The bank is a party in interest or disqualified person with respect to the plan solely by reason of the furnishing of checking account or related services to the plan;
- C. The terms of the transaction are at least as favorable to the plan as those of an arm's-length transaction with an unrelated party would be; and
- D. The investment is not part of an arrangement under which the bank causes a transaction to be made with or for the benefit of a party in interest or disqualified person.

For purposes of this exemption the term "affiliate" is defined in 29 CFR 2510.3-

21(e).

For purposes of this exemption, the terms “employee benefit plan” and “plan” refer to an employee benefit plan described in ERISA section 3(3) and/or a plan described in section 4975(e)(1) of the Code.

PTE 95-60

PTE 95-60 is amended to read as follows:

*Section I—Basic Exemption.*

The restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the transactions described below if the applicable conditions set forth in section IV are met.

(a) General Exemption. Any transaction between a party in interest with respect to a plan and an insurance company general account in which the plan has an interest either as a contractholder or as the beneficial owner of a contract, or any acquisition, or holding by the general account of employer securities or employer real property, if at the time of the transaction, acquisition, or holding, the amount of reserves and liabilities for the general account contract(s) held by or on behalf of the plan, as defined by the annual statement for life insurance companies approved by the National Association of Insurance Commissioners (NAIC Annual Statement) together with the amount of the reserves and liabilities for the general account contracts held by or on behalf of any other plans maintained by the same employer (or affiliate thereof as defined in section V(a)(1)) or by the same employee organization, as defined by the NAIC Annual Statement in the general account do not exceed 10% of the total reserves and liabilities of the general account (exclusive of separate account liabilities) plus surplus as set forth in the NAIC Annual Statement filed with the state of domicile of the insurer. For purposes of determining the percentage limitation, the amount of reserves and liabilities for the

general account contract(s) held by or on behalf of a plan shall be determined before reduction for credits on account of any reinsurance ceded on a coinsurance basis. Notwithstanding the foregoing, the 10% limitation is only applicable to transactions occurring on or after July 12, 1995.

(b) Excess Holdings Exemption for Employee Benefit Plans. Any acquisition or holding of qualifying employer securities or qualifying employer real property by a plan (other than through an insurance company general account), if:

(1) The acquisition or holding contravenes the restrictions of section 406(a)(1)(E), 406(a)(2), and 407(a) of the Act solely by reason of being aggregated with employer securities or employer real property held by an insurance company general account in which the plan has an interest; and

(2) The percentage limitation of paragraph (a) of this section is met.

#### *Section II—Specific Exemptions*

(a) Transactions with persons who are parties in interest to the plan solely by reason of being certain service providers or certain affiliates of service providers. The restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to any transaction to which the above restrictions or taxes would otherwise apply solely because a person is deemed to be a party in interest (including a fiduciary) with respect to a plan as a result of providing services to an insurance company general account in which the plan has an interest either as a contractholder or as the beneficial owner of a contract (or as a result of a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H) or (I) of the Code), if the applicable conditions set forth in section IV are met.

(b) Transactions involving place of public accommodation. The restrictions of sections 406(a)(1)(A) through (D), 406(b)(1) and (b)(2) of the Act and the taxes imposed

by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the furnishing of services, facilities, and any goods incidental to such services and facilities by a place of public accommodation owned by an insurance company general account to a party in interest with respect to a plan that has an interest as a contractholder or beneficial owner of a contract in the insurance company general account, if the services, facilities, and incidental goods are furnished on a comparable basis to the general public.

*Section III—Specific Exemption for Operation of Asset Pool Investment Trusts*

(a) The restrictions of sections 406(a), 406(b), and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c) of the Code shall not apply to transactions in connection with the servicing, management, and operation of a trust in which an insurance company general account has an interest as a result of its acquisition of certificates issued by the trust, provided:

(1) The trust is described in Prohibited Transaction Exemption 83-1 (48 FR 895, January 7, 1983) or in one of the Underwriter Exemptions (as defined in section V(h) below):

(2) The conditions of either PTE 83-1 or the relevant Underwriter Exemption are met, except for the requirements that:

(A) the rights and interests evidenced by the certificates acquired by the general account are not subordinated to the rights and interests evidenced by other certificates of the same trust; and

(B) Effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, the certificates acquired by the general account have the credit quality required under the relevant Underwriter Exemption at the time of such acquisition.

Notwithstanding the foregoing, the exemption shall apply to a transaction

described in this section III if: (i) A plan acquired certificates in a transaction that was not prohibited, or otherwise satisfied the conditions of Part II or Part III of PTE 75-1 (40 FR 50845, October 31, 1975); (ii) the underlying assets of a trust include plan assets under section 2510.3-101(f) of the plan assets regulation with respect to the class of certificates acquired by the plan as a result of an insurance company general account investment in any class of certificates; and (iii) the requirements of this section III(a)(1) and (2) are met, except that the words “acquired by the general account” in section III(a)(2)(A) and (B) should be construed to mean “acquired by the plan.”

(b) The restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to any transaction to which the above restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest (including a fiduciary) with respect to a plan as a result of providing services to a plan (or as a result of a relationship to such service provider described in section 3(14)(F), (G), (H), or (I) of the Act or section 4975(e)(2)(F), (G), (H), or (I) of the Code) solely because of the plan’s ownership of certificates issued by a trust that satisfies the requirements described in section III(a) above.

#### *Section IV—General Conditions.*

(a) At the time the transaction is entered into, and at the time of any subsequent renewal thereof that requires the consent of the insurance company, the terms of the transaction are at least as favorable to the insurance company general account as the terms generally available in arm’s-length transactions between unrelated parties.

(b) The transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest.

(c) The party in interest is not the insurance company, any pooled separate account of the insurance company, or an affiliate of the insurance company.

*Section V—Definitions.*

For the purpose of this exemption:

(a) An “affiliate” of a person means—

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee (including, in the case of an insurance company, an insurance agent thereof, whether or not the agent is a common law employee of the insurance company), or relative of, or partner in, any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(b) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) The term “employer securities” means “employer securities” as that term is defined in Act section 407(d)(1), and the term “employer real property” means “employer real property” as defined in Act section 407(d)(2).

(d) The term “insurance company” means an insurance company authorized to do business under the laws of one or more states.

(e) The term “insurance company general account” means all of the assets of an insurance company that are not legally segregated and allocated to separate accounts under applicable state law.

(f) The term “party in interest” means a person described in Act section 3(14) and includes a “disqualified person” as defined in Code section 4975(e)(2).

(g) The term “relative” means a “relative” as that term is defined in section 3(15) of the Act (or a “member of the family” as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or sister.

(h) The term “Underwriter Exemption” refers to the following individual

Prohibited Transaction Exemptions (PTEs)—

PTE 89–88, 54 FR 42582 (October 17, 1989); PTE 89–89, 54 FR 42569 (October 17, 1989); PTE 89–90, 54 FR 42597 (October 17, 1989); PTE 90–22, 55 FR 20542 (May 17, 1990); PTE 90–23, 55 FR 20545 (May 17, 1990); PTE 90–24, 55 FR 20548 (May 17, 1990); PTE 90–28, 55 FR 21456 (May 24, 1990); PTE 90–29, 55 FR 21459 (May 24, 1990); PTE 90–30, 55 FR 21461 (May 24, 1990); PTE 90–31, 55 FR 23144 (June 6, 1990); PTE 90–32, 55 FR 23147 (June 6, 1990); PTE 90–33, 55 FR 23151 (June 6, 1990); PTE 90–36, 55 FR 25903 (June 25, 1990); PTE 90–39, 55 FR 27713 (July 5, 1990); PTE 90–59, 55 FR 36724 (September 6, 1990); PTE 90–83, 55 FR 50250 (December 5, 1990); PTE 90–84, 55 FR 50252 (December 5, 1990); PTE 90–88, 55 FR 52899 (December 24, 1990); PTE 91–14, 55 FR 48178 (February 22, 1991); PTE 91–22, 56 FR 03277 (April 18, 1991); PTE 91–23, 56 FR 15936 (April 18, 1991); PTE 91–30, 56 FR 22452 (May 15, 1991); PTE 91–39, 56 FR 33473 (July 22, 1991); PTE 91–62, 56 FR 51406 (October 11, 1991); PTE 93–6, 58 FR 07255 (February 5, 1993); PTE 93–31, 58 FR 28620 (May 5, 1993); PTE 93–32, 58 FR 28623 (May 14, 1993); PTE 94–29, 59 FR 14675 (March 29, 1994); PTE 94–64, 59 FR 42312 (August 17, 1994); PTE 94–70, 59 FR 50014 (September 30, 1994); PTE 94–73, 59 FR 51213 (October 7, 1994); PTE 94–84, 59 FR 65400 (December 19, 1994); and any other exemption providing similar relief to the extent that the Department expressly determines, as part of the proceeding to grant such exemption, to include the exemption within this definition.

(i) For purposes of this exemption, the time as of which any transaction, acquisition, or holding occurs is the date upon which the transaction is entered into, the acquisition is made, or the holding commences. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into, or acquisition made, on or after January 1, 1975, or any renewal that requires the consent of the insurance company occurs on or after January 1,

1975, and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, or at the time the acquisition is made, the requirements will continue to be satisfied thereafter with respect to the transaction or acquisition, and the exemption shall apply thereafter to the continued holding of the securities or property so acquired. This exemption also applies to any transaction or acquisition entered into or renewed, or holding commencing prior to January 1, 1975, if either the requirements of this exemption would have been satisfied on the date the transaction was entered into or acquisition was made (or on which the holding commenced), or the requirements would have been satisfied on January 1, 1975, if the transaction had been entered into, the acquisition was made, or the holding had commenced, on January 1, 1975. Notwithstanding the foregoing, this exemption shall cease to apply to a transaction or holding exempt by virtue of section I(a) or section I(b) at such time as the interest of the plan in the insurance company general account exceeds the percentage interest limitation contained in section I(a), unless no portion of such excess results from an increase in the assets allocated to the insurance company general account by the plan. For this purpose, assets allocated do not include the reinvestment of general account earnings. Nothing in this paragraph shall be construed as exempting a transaction entered into by an insurance company general account that becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of the exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption.

(j) The terms “employee benefit plan” and “plan” refer to an employee benefit plan described in section 3(3) of ERISA and/or a plan described in section 4975(e)(1) of the Code.

*Section VI. Effective date.*



The effective date of this exemption is January 1, 1975.

PTE 97-41

PTE 97-41 is amended to read as follows:

*Section I. Retroactive Exemption for the Purchase of Fund Shares With Assets Transferred In-Kind From a CIF*

For the period from October 1, 1988 to August 8, 1997, the restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E), shall not apply to the purchase by an employee benefit plan (the Client Plan) of shares of one or more open-end management investment companies (the Fund or Funds) registered under the Investment Company Act of 1940, in exchange for assets of the Client Plan transferred in-kind to the Fund from a collective investment fund (the CIF) maintained by a bank (the Bank) or a plan adviser (the Plan Adviser), where the Bank or Plan Adviser is the investment adviser to the Fund and also a fiduciary of the Client Plan. The transfer and purchase must be in connection with a complete withdrawal of the Client Plan's assets from the CIF, and the following conditions must be met:

(a) No sales commissions or other fees are paid by the Client Plan in connection with the purchase of Fund shares.

(b) All transferred assets are securities for which market quotations are readily available, or cash.

(c) The transferred assets constitute the Client Plan's pro rata portion of all assets that were held by the CIF immediately prior to the transfer.

(d) The Client Plan receives Fund shares that have a total net asset value equal to the value of the Client Plan's transferred assets on the date of the transfer, as determined with respect to securities, in a single valuation for each asset, with all valuations performed in the same manner, at the close of the same business day, in accordance with

Securities and Exchange Commission Rule 17a–7 (using sources independent of the Bank or Plan Adviser and the Fund) and the procedures established by the Funds pursuant to Rule 17a–7.

(e) An independent fiduciary with respect to the Client Plan (the Independent Fiduciary) receives advance written notice of an in-kind transfer and purchase of assets and full written disclosure of information concerning the Fund which includes the following:

(1) A current prospectus for each Fund to which the CIF assets may be transferred;

(2) A statement describing the fees to be charged to, or paid by, a Client Plan and the Funds to the Bank or Plan Adviser, including the nature and extent of any differential between the rates of the fees;

(3) A statement of the reasons why the Bank or Plan Adviser may consider the transfer and purchase to be appropriate for the Client Plan; and

(4) A statement of whether there are any limitations on the Bank or Plan Adviser with respect to which plan assets may be invested in shares of the Funds, and, if so, the nature of such limitations.

(f) On the basis of the foregoing information, the Independent Fiduciary gives prior approval, in writing, for each purchase of Fund shares in exchange for the Client Plan's assets transferred from the CIF, consistent with the responsibilities, obligations and duties imposed on fiduciaries by Part 4 of Title I of the Act.

(g) The Bank or Plan Adviser sends by regular mail or personal delivery to the Independent Fiduciary of each Client Plan that purchases Fund shares in connection with the in-kind transfer, no later than 105 days after completion of each purchase, a written confirmation of the transaction containing—

(1) The number of CIF units held by the Client Plan immediately before the in-

kind transfer, the related per unit value and the total dollar amount of such CIF units; and

(2) The number of shares in the Funds that are held by the Client Plan immediately following the purchase, the related per share net asset value and the total dollar amount of such shares.

(h) As to each Client Plan, the combined total of all fees received by the Bank or Plan Adviser for the provision of services to the Client Plan, and in connection with the provision of services to a Fund in which a Client Plan holds shares purchased in connection with the in-kind transfer, is not in excess of “reasonable compensation” within the meaning of section 408(b)(2) of the Act.

(i) All dealings in connection with the in-kind transfer and purchase between the Client Plan and a Fund are on a basis no less favorable to the Client Plan than dealings between the Fund and other shareholders.

*Section II. Prospective Exemption for the Purchase of Fund Shares With Assets Transferred In-Kind From a CIF*

Effective after August 8, 1997, the restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the purchase by an employee benefit plan (the Client Plan) of shares of one or more open-end management investment companies (the Fund or Funds) registered under the Investment Company Act of 1940, in exchange for assets of the Client Plan transferred in-kind to the Fund from a collective investment fund (the CIF) maintained by a bank (the Bank) or a plan adviser (the Plan Adviser), where the Bank or Plan Adviser is the investment adviser to the Fund and also a fiduciary of the Client Plan. The transfer and purchase must be in connection with a complete withdrawal of the Client Plan’s assets from the CIF, and the following conditions must be met:

(a) No sales commissions or other fees are paid by the Client Plan in connection

with the purchase of Fund shares.

(b) All transferred assets are securities for which market quotations are readily available, or cash.

(c) The transferred assets constitute the Client Plan's pro rata portion of all assets that were held by the CIF immediately prior to the transfer. Notwithstanding the foregoing, the allocation of fixed-income securities held by a CIF among Client Plans on the basis of each Client Plan's pro rata share of the aggregate value of such securities will not fail to meet the requirements of this subsection if:

(1) The aggregate value of such securities does not exceed one (1) percent of the total value of the assets held by the CIF immediately prior to the transfer; and

(2) Effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, such securities have the same coupon rate and maturity, and at the time of the transfer, the same credit quality.

(d) The Client Plan receives Fund shares that have a total net asset value equal to the value of the Client Plan's transferred assets on the date of the transfer, as determined with respect to securities, in a single valuation for each asset, with all valuations performed in the same manner, at the close of the same business day, in accordance with Securities and Exchange Commission Rule 17a-7 (using sources independent of the Bank or Plan Adviser and the Fund) and the procedures established by the Funds pursuant to Rule 17a-7.

(e) An independent fiduciary with respect to the Client Plan (the Independent Fiduciary) receives advance written notice of the in-kind transfer and purchase of assets and full written disclosure of information concerning the Funds which includes the following:

(1) A current prospectus for each Fund to which the CIF assets may be transferred;

(2) A statement describing the fees to be charged to, or paid by, a Client Plan and the Funds to the Bank or Plan Adviser, including the nature and extent of any differential between the rates of the fees paid by the Fund and the rates of the fees paid by the Client Plan in connection with the Client Plan's investment in the CIF;

(3) A statement of the reasons why the Bank or Plan Adviser may consider the transfer and purchase to be appropriate for the Client Plan;

(4) A statement of whether there are any limitations on the Bank or Plan Adviser with respect to which plan assets may be invested in shares of the Funds, and, if so, the nature of such limitations;

(5) The identity of all securities that will be valued in accordance with Rule 17a-7(b)(4) and allocated on the basis of the Client Plan's pro rata portion under section II(c); and

(6) The identity of any fixed-income securities that will be allocated on the basis of each Client Plan's pro rata share of the aggregate value of such securities pursuant to section II(c).

(f) On the basis of the foregoing information, the Independent Fiduciary gives prior approval, in writing, for each purchase of Fund shares in exchange for the Client Plan's assets transferred from the CIF, consistent with the responsibilities, obligations and duties imposed on fiduciaries by Part 4 of Title I of the Act. In addition, the Independent Fiduciary must give prior approval, in writing, for the receipt of confirmation statements described below in paragraph (g)(1) and (g)(2) by facsimile or electronic mail if the Independent Fiduciary elects to receive such statements in that form.

(g) The Bank or Plan Adviser sends by regular mail or personal delivery or, if applicable, by facsimile or electronic mail to the Independent Fiduciary of each Client Plan that purchases Fund shares in connection with the in-kind transfer, the following

information:

(1) No later than 30 days after the completion of the purchase, a written confirmation which contains—

(i) The identity of each transferred security that was valued for purposes of the purchase of Fund shares in accordance with Rule 17a-7(b)(4);

(ii) The current market price, as of the date of the in-kind transfer, of each such security involved in the purchase of Fund shares; and

(iii) The identity of each pricing service or market-maker consulted in determining the current market price of such securities.

(2) No later than 105 days after the completion of each purchase, a written confirmation which contains—

(i) The number of CIF units held by the Client Plan immediately before the in-kind transfer, the related per unit value and the total dollar amount of such CIF units; and

(ii) The number of shares in the Funds that are held by the Client Plan immediately following the purchase, the related per share net asset value and the total dollar amount of such shares.

(h) With respect to each of the Funds in which the Client Plan continues to hold shares acquired in connection with the in-kind transfer, the Bank or Plan Adviser provides the Independent Fiduciary of the Client Plan with—

(1) A copy of an updated prospectus of such Fund, at least annually; and

(2) Upon request of the Independent Fiduciary, a report or statement (which may take the form of the most recent financial report, the current Statement of Additional Information, or some other written statement) containing a description of all fees paid by the Fund to the Bank or Plan Adviser.

(i) As to each Client Plan, the combined total of all fees received by the Bank or Plan Adviser for the provision of services to the Client Plan, and in connection with the

provision of services to a Fund in which a Client Plan holds shares acquired in connection with the in-kind transfer, is not in excess of “reasonable compensation” within the meaning of section 408(b)(2) of the Act.

(j) All dealings in connection with the in-kind transfer and purchase between the Client Plan and a Fund are on a basis no less favorable to the Client Plan than dealings between the Fund and other shareholders.

*Section III. Availability of Prohibited Transaction Exemption (PTE) 77–4*

Any purchase of Fund shares that complies with the conditions of either Section I or Section II of this class exemption shall be treated as a “purchase or sale” of shares of an open-end investment company for purposes of PTE 77–4 and shall be deemed to have satisfied paragraphs (a), (d) and (e) of section II of that exemption. 42 FR 18732 (April 8, 1977).

*Section IV. Definitions*

For purposes of this exemption:

(a) The term “Bank” means a bank or trust company, and any affiliate thereof [as defined below in paragraph (b)(1)], which is supervised by a state or federal agency.

(b) An “affiliate” of a person includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person.

(2) Any officer, director, employee or relative of such person, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner or employee.

(c) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term “collective investment fund” or “CIF” means a common or

collective trust fund or pooled investment fund maintained by a “Bank” as defined in paragraph (a) of this Section IV or by a “Plan Adviser” as defined in paragraph (m) of this Section IV for the collective investment of the assets attributable to two or more plans maintained by unrelated employers.

(e) The term “Fund” or “Funds” means any open-end management investment company or companies registered under the 1940 Act for which the Bank or Plan Adviser serves as an investment adviser, and may also serve as a custodian, shareholder servicing agent, transfer agent or provide some other secondary service (as defined below in paragraph (i) of this section). (f) The term “net asset value” means the amount calculated by dividing the value of all securities, determined by a method as set forth in a Fund’s prospectus and Statement of Additional Information, and other assets belonging to each of the portfolios in such Fund, less the liabilities chargeable to each portfolio, by the number of outstanding shares.

(g) The term “relative” means a “relative” as that term is defined in section 3(15) of the Act (or a “member of the family” as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(h) The term “Independent Fiduciary” means a fiduciary of a Client Plan who is independent of and unrelated to the Bank or Plan Adviser. For purposes of this exemption, the Independent Fiduciary will not be deemed to be independent of and unrelated to the Bank or Plan Adviser if:

(1) Such fiduciary directly or indirectly controls, is controlled by, or is under common control with the Bank or Plan Adviser;

(2) Such fiduciary, or any officer, director, partner, employee, or relative of such fiduciary, is an officer, director, partner, employee of the Bank or Plan Adviser (or is a relative of such persons);

(3) Such fiduciary, directly or indirectly receives any compensation or other



consideration for his or her own personal account in connection with any transaction described in this exemption.

If an officer, director, partner, employee of the Bank or Plan Adviser (or relative of such persons), is a director of such Independent Fiduciary, and if he or she abstains from participation in (i) the choice of the Client Plan's investment adviser, and (ii) the approval of any purchase or sale between the Client Plan and the Funds, as well as any transaction described in Sections I and II above, then paragraph (h)(2) of this Section IV shall not apply.

(i) The term "secondary service" means a service provided by a Bank or Plan Adviser to a Fund other than investment management, investment advisory or similar services.

(j) The term "fixed-income security" means any interest-bearing or discounted government or corporate security with a face amount of \$1,000 or more that obligates the issuer to pay the holder a specified sum of money, at specific intervals, and to repay the principal amount of the loan at maturity.

(k) The term "Client Plan" means a pension plan described in 29 CFR 2510.3-2, a welfare benefit plan described in 29 CFR 2510.3-1, and a plan described in section 4975(e)(1) of the Code, but does not include an employee benefit plan established or maintained by the Bank or a Plan Adviser for its own employees.

(l) The term "security" shall have the same meaning as defined in section 2(36) of the 1940 Act, as amended, 15 U.S.C. 80a-2(36) (1996).

(m) The term "Plan Adviser" means an investment adviser registered under the Investment Advisers Act of 1940, and any "affiliate" thereof [as defined above in paragraph (b)(1)].

(n) The term "business day" means a banking day as defined by federal or state banking regulations.

(o) The term “unrelated employers” means persons which are not, directly or indirectly, affiliates, as defined above in paragraph (b)(1).

(p) The term “personal delivery” means delivery of the information described in sections I(g) and II(g) above to an individual or individuals designated by the Client Plan to act on behalf of the Independent Fiduciary.

#### PTE 2006-16

PTE 2006-16 is amended to read as follows:

##### *I. Transactions*

(a) Effective January 2, 2007, the restrictions of section 406(a)(1)(A) through (D) of ERISA and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the lending of securities that are assets of an employee benefit plan to a “U.S. Broker-Dealer” or to a “U.S. Bank,” provided that the conditions set forth in section II below are met.

(b) Effective January 2, 2007, the restrictions of section 406(a)(1)(A) through (D) of ERISA and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the lending of securities that are assets of an employee benefit plan to a “Foreign Broker-Dealer” or “Foreign Bank”, provided that the conditions set forth in sections II and III below are met.

(c) Effective January 2, 2007, the restrictions of section 406(b)(1) of ERISA and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to the payment to a fiduciary (the Lending Fiduciary) of compensation for services rendered in connection with loans of plan assets that are securities, provided that the conditions set forth in section IV below are met.

##### *II. General Conditions For Transactions Described in Sections I(a) and I(b)*

(a) Neither the borrower nor any affiliate of the borrower has or exercises discretionary authority or control with respect to the investment of the plan assets

involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets;

(b) The plan receives from the borrower by the close of the Lending Fiduciary's business on the day in which the securities lent are delivered to the borrower, (1) "U.S. Collateral" having, as of the close of business on the preceding business day, a market value or, in the case of bank letters of credit, a stated amount, equal to not less than 100 percent of the then market value of the securities lent; or

(2) "Foreign Collateral" having as of the close of business on the preceding business day, a market value or, in the case of bank letters of credit, a stated amount, equal to not less than:

(i) 102 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in section V(k)) on which the securities are primarily traded if the collateral posted is denominated in the same currency as the securities lent, or

(ii) 105 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in V(k)) on which the securities are primarily traded if the collateral posted is denominated in a different currency than the securities lent.

Notwithstanding the foregoing, if the Lending Fiduciary is a U.S. Bank or U.S. Broker-Dealer, and such Lending Fiduciary indemnifies the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default, the plan receives from the borrower by the close of the Lending Fiduciary's business on the day in which the securities lent are delivered to the borrower, "Foreign Collateral" having as of the close of business on the preceding business day, a market value or, in the case of bank letters of credit, a stated amount, equal to not less than:

(iii) 100 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in section V(k)) on which the securities are primarily traded if the collateral posted is denominated in the same currency as the securities lent; or

(iv) 101 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in V(k)) on which the securities are primarily traded if the collateral posted is denominated in a different currency than the securities lent and such currency is denominated in Euros, British pounds, Japanese yen, Swiss francs or Canadian dollars; or

(v) 105 percent of the then market value of the securities lent as valued on a recognized securities exchange (as defined in section V(j)) or an automated trading system (as defined in V(k)) if the collateral posted is denominated in a different currency than the securities lent and such currency is other than those specified above.

(c)(1) If the borrower is a U.S. Bank or U.S. Broker-Dealer, the Plan receives such U.S. Collateral or Foreign Collateral from the borrower by the close of the Lending Fiduciary's business on the day in which the securities are delivered to the borrower. Such collateral is received by the plan either by physical delivery, wire transfer or by book entry in a securities depository located in the United States. or,

(2) If the borrower is a Foreign Bank or Foreign Broker-Dealer, the plan receives U.S. Collateral or Foreign Collateral from the borrower by the close of the Lending Fiduciary's business on the day in which the securities are delivered to the borrower. Such collateral is received by the plan either by physical delivery, wire transfer or by book entry in a securities depository located in the United States or held on behalf of the plan at an Eligible Securities Depository. The indicia of ownership of such collateral shall be maintained in accordance with section 404(b) of ERISA and 29 CFR 2550.404b-1.

(d) Prior to making of any such loan, the borrower shall have furnished the

Lending Fiduciary with:

(1) The most recent available audited statement of the borrower's financial condition, as audited by a United States certified public accounting firm or in the case of a borrower that is a Foreign Broker-Dealer or Foreign Bank, a firm which is eligible or authorized to issue audited financial statements in conformity with accounting principles generally accepted in the primary jurisdiction that governs the borrowing Foreign Broker-Dealer or Foreign Bank;

(2) The most recent available unaudited statement of its financial condition (if the unaudited statement is more recent than such audited financial statement); and

(3) A representation that, at the time the loan is negotiated, there has been no material adverse change in its financial condition since the date of the most recent financial statement furnished to the plan that has not been disclosed to the Lending Fiduciary. Such representations may be made by the borrower's agreement that each loan shall constitute a representation by the borrower that there has been no such material adverse change.

(e) The loan is made pursuant to a written loan agreement, the terms of which are at least as favorable to the plan as an arm's-length transaction with an unrelated party would be. Such loan agreement states that the plan has a continuing security interest in, title to, or the rights of a secured creditor with respect to the collateral. Such agreement may be in the form of a master agreement covering a series of securities lending transactions.

(f) In return for lending securities, the plan:

(1) Receives a reasonable fee (in connection with the securities lending transaction), and/or

(2) Has the opportunity to derive compensation through the investment of the currency collateral. Where the plan has that opportunity, the plan may pay a loan rebate

or similar fee to the borrower, if such fee is not greater than the plan would pay in a comparable transaction with an unrelated party.

(g) All fees and other consideration received by the plan in connection with the loan of securities are reasonable. The identity of the currency in which the payment of fees and rebates will be made shall be disclosed to the plan either in the written loan agreement or the loan confirmation as agreed to by the borrower and the plan (or Lending Fiduciary) prior to the making of the loan.

(h) The plan receives the equivalent of all distributions made to holders of the borrowed securities during the term of the loan including, but not limited to, dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities;

(i) If the market value of the collateral at the close of trading on a business day is less than the applicable percentage of the market value of the borrowed securities at the close of trading on that day (as described in section II(b) of this exemption), then the borrower shall deliver, by the close of business on the following business day, an additional amount of U.S. Collateral or Foreign Collateral the market value of which, together with the market value of all previously delivered collateral, equals at least the applicable percentage of the market value of all the borrowed securities as of such preceding day.

Notwithstanding the foregoing, part of the U.S. Collateral or Foreign Collateral may be returned to the borrower if the market value of the collateral exceeds the applicable percentage (described in section II(b) of the exemption) of the market value of the borrowed securities, as long as the market value of the remaining U.S. Collateral or Foreign Collateral equals at least the applicable percentage of the market value of the borrowed securities;

(j) The loan may be terminated by the plan at any time, whereupon the borrower

shall deliver certificates for securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the plan within the lesser of:

- (1) The customary delivery period for such securities,
- (2) Five business days, or
- (3) The time negotiated for such delivery by the plan and the borrower.

(k) In the event that the loan is terminated, and the borrower fails to return the borrowed securities or the equivalent thereof within the applicable time described in section II(j) above, the plan may, under the terms of the loan agreement:

(1) Purchase securities identical to the borrowed securities (or their equivalent as described above) and may apply the collateral to the payment of the purchase price, any other obligations of the borrower under the agreement, and any expenses associated with the sale and/or purchase, and

(2) The borrower is obligated, under the terms of the loan agreement, to pay, and does pay to the plan the amount of any remaining obligations and expenses not covered by the collateral, including reasonable attorney's fees incurred by the plan for legal action arising out of default on the loans, plus interest at a reasonable rate.

Notwithstanding the foregoing, the borrower may, in the event the borrower fails to return borrowed securities as described above, replace collateral, other than U.S. currency, with an amount of U.S. currency that is not less than the then current market value of the collateral, provided such replacement is approved by the Lending Fiduciary.

(l) If the borrower fails to comply with any provision of a loan agreement which requires compliance with this exemption, the plan fiduciary who caused the plan to engage in such transaction shall not be deemed to have caused the plan to engage in a transaction prohibited by section 406(a)(1)(A) through (D) of ERISA solely by reason of the borrower's failure to comply with the conditions of the exemption.

### *III. Specific Conditions For Transactions Described in Section I(b)*

(a) The Lending Fiduciary maintains the written documentation for the loan agreement at a site within the jurisdiction of the courts of the United States.

(b) Prior to entering into a transaction involving a Foreign Broker-Dealer that is described in section V(c)(1) or a Foreign Bank that is described in section V(d)(1) either:

(1) The Foreign Broker-Dealer or Foreign Bank agrees to submit to the jurisdiction of the United States; agrees to appoint an agent for service of process in the United States, which may be an affiliate (the Process Agent); consents to service of process on the Process Agent; and agrees that any enforcement by a plan of its rights under the securities lending agreement will, at the option of the plan, occur exclusively in the United States courts; or

(2) The Lending Fiduciary, if a U.S. Bank or U.S. Broker-Dealer, agrees to indemnify the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs incurred (including attorney's fees of such plan arising out of the default on the loans or the failure to indemnify properly under this provision) which the plan may incur or suffer directly arising out of a borrower default by the Foreign Broker-Dealer or Foreign Bank.

(c) In the case of a securities lending transaction involving a Foreign Broker-Dealer that is described in section V(c)(2) or a Foreign Bank that is described in section V(d)(2), the Lending Fiduciary must be a U.S. Bank or U.S. Broker-Dealer, and prior to entering into the loan transaction, such fiduciary must agree to indemnify the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs incurred (including attorney's fees of such plan arising out of the default on the loans or the failure to indemnify properly under this provision) which the



plan may incur or suffer directly arising out of a borrower default by the Foreign Broker-Dealer or Foreign Bank.

*IV. Specific Conditions for Transactions Described in Section I(c)*

(a) The loan of securities is not prohibited by section 406(a) of ERISA or otherwise satisfies the conditions of this exemption.

(b) The Lending Fiduciary is authorized to engage in securities lending transactions on behalf of the plan.

(c) The compensation is reasonable and is paid in accordance with the terms of a written instrument, which may be in the form of a master agreement covering a series of securities lending transactions.

(d) Except as otherwise provided in section IV(f), the arrangement under which the compensation is paid:

(1) Is subject to the prior written authorization of a plan fiduciary (the “authorizing fiduciary”), who is (other than in the case of a plan covering only employees of the Lending Fiduciary or any affiliates of such fiduciary) independent of the Lending Fiduciary and of any affiliate thereof, and

(2) May be terminated by the authorizing fiduciary within:

(A) The time negotiated for such notice of termination by the plan and the Lending Fiduciary, or

(B) five business days, whichever is less, in either case without penalty to the plan.

(e) No such authorization is made or renewed unless the Lending Fiduciary shall have furnished the authorizing fiduciary with any reasonably available information which the Lending Fiduciary reasonably believes to be necessary to determine whether such authorization should be made or renewed, and any other reasonably available information regarding the matter that the authorizing fiduciary may reasonably request.

(f) (Special Rule for Commingled Investment Funds) In the case of a pooled separate account maintained by an insurance company qualified to do business in a State or a common or collective trust fund maintained by a bank or trust company supervised by a State or Federal agency, the requirements of section IV(d) of this exemption shall not apply, provided that:

(1) The information described in section IV(e) (including information with respect to any material change in the arrangement) shall be furnished by the Lending Fiduciary to the authorizing fiduciary described in section IV(d) with respect to each plan whose assets are invested in the account or fund, not less than 30 days prior to implementation of the arrangement or material change thereto, and, where requested, upon the reasonable request of the authorizing fiduciary;

(2) In the event any such authorizing fiduciary submits a notice in writing to the Lending Fiduciary objecting to the implementation of, material change in, or continuation of the arrangement, the plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the account or fund, without penalty to the plan, within such time as may be necessary to effect such withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans. In the case of a plan that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a plan electing to withdraw; and

(3) In the case of a plan whose assets are proposed to be invested in the account or fund subsequent to the implementation of the compensation arrangement and which has not authorized the arrangement in the manner described in sections IV(f)(1) and IV(f)(2), the plan's investment in the account or fund shall be authorized in the manner described in section IV(d)(1).

## *V. Definitions*

For purposes of this exemption:

(a) The term “U.S. Broker-Dealer” means a broker-dealer registered under the Securities Exchange Act of 1934 (the 1934 Act or the Exchange Act) or exempted from registration under section 15(a)(1) of the 1934 Act as a dealer in exempted government securities (as defined in section 3(a)(12) of the 1934 Act).

(b) The term “U.S. Bank” means a bank as defined in section 202(a)(2) of the Investment Advisers Act.

(c) The term “Foreign Broker-Dealer” means a broker-dealer that has, as of the last day of its most recent fiscal year, equity capital that is equivalent of no less than \$200 million and is: (1)(i) Registered and regulated under the laws of the Financial Services Authority in the United Kingdom, or

(ii)(a) registered and regulated by a securities commission of a Province of Canada that is a member of the Canadian Securities Administration, and (b) is subject to the oversight of a Canadian self-regulatory authority; or

(2) registered and regulated under the relevant securities laws of a governmental entity of a country other than the United States, and such securities laws and regulation were applicable to a broker-dealer that received: (i) An individual exemption, granted by the Department under section 408(a) of ERISA, involving the loan of securities by a plan to a broker-dealer or (ii) a final authorization by the Department to engage in an otherwise prohibited transaction pursuant to PTE 96-62, as amended, involving the loan of securities by a plan to a broker-dealer.

(d) The term “Foreign Bank” means an institution that has substantially similar powers to a bank as defined in section 202(a)(2) of the Investment Advisers Act, has as of the last day of its most recent fiscal year, equity capital which is equivalent of no less than \$200 million, and is subject to:

(1) Regulation by the Financial Services Authority in the United Kingdom or the Office of the Superintendent of Financial Institutions in Canada, or

(2) regulation by the relevant governmental banking agency(ies) of a country other than the United States, and the regulation and oversight of these banking agencies were applicable to a bank that received: (a) An individual exemption, granted by the Department under section 408(a) of ERISA, involving the loan of securities by a plan to a bank or (b) a final authorization by the Department to engage in an otherwise prohibited transaction pursuant to PTE 96-62, as amended, involving the loan of securities by a plan to a bank.

(e) The term “U.S. Collateral” means:

(1) U.S. currency;

(2) “government securities” as defined in section 3(a)(42)(A) and (B) of the Exchange Act;

(3) “government securities” as defined in section 3(a)(42)(C) of the Exchange Act issued or guaranteed as to principal or interest by the following corporations: The Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, the Student Loan Marketing Association and the Financing Corporation

(4) mortgage-backed securities meeting the definition of a “mortgage related security” set forth in section 3(a)(41) of the Exchange Act;

(5) negotiable certificates of deposit and bankers acceptances issued by a “bank” as that term is defined in section 3(a)(6) of the Exchange Act, and which are payable in the United States and deemed to have a “ready market” as that term is defined in 17 CFR 240.15c3-1; or

(6) irrevocable letters of credit issued by a U.S. Bank other than the borrower or an affiliate thereof, or any combination, thereof.

(f) Effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION]**

**IN THE FEDERAL REGISTER]**, the term “Foreign Collateral” means:

(1) Securities issued by or guaranteed as to principal and interest by the following Multilateral Development Banks—the obligations of which are backed by the participating countries, including the United States: The International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development and the International Finance Corporation;

(2) foreign sovereign debt securities that are (i) subject to a minimal amount of credit risk, and (ii) sufficiently liquid that such securities can be sold at or near their fair market value in the ordinary course of business within seven calendar days;

(3) the British pound, the Canadian dollar, the Swiss franc, the Japanese yen or the Euro;

(4) irrevocable letters of credit issued by a Foreign Bank, other than the borrower or an affiliate thereof, provided that, at the time the letters of credit are issued, the Foreign Bank’s ability to honor its commitments thereunder is subject to no greater than moderate credit risk; or

(5) any type of collateral described in Rule 15c3-3 of the Exchange Act as amended from time to time provided that the lending fiduciary is a U.S. Bank or U.S. Broker-Dealer and such fiduciary indemnifies the plan with respect to the difference, if any, between the replacement cost of the borrowed securities and the market value of the collateral on the date of a borrower default plus interest and any transaction costs which a plan may incur or suffer directly arising out of a borrower default. Notwithstanding the foregoing, collateral described in any of the categories enumerated in section V(e) will be considered U.S. Collateral for purposes of the exemption.

(g) The term “affiliate” of another person means:

(1) Any person directly or indirectly, through one or more intermediaries,

controlling, controlled by, or under common control with such person;

(2) Any officer, director, partner, employee, or relative (as defined in section 3(15) of ERISA) of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director, partner or employee.

(h) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(i) The term “Eligible Securities Depository” means an eligible securities depository as that term is defined under Rule 17f-7 of the Investment Company Act of 1940 [15 U.S.C. 80a], as such definition may be amended from time to time.

(j) The term “recognized securities exchange” means a U.S. securities exchange that is registered as a “national securities exchange” under section 6 of the Exchange Act of 1934 (15 U.S.C. 78f) or a designated offshore securities market as defined in Regulation S of the Securities Act of 1933 [17 CFR part 230.902(B)], as such definition may be amended from time to time, which performs with respect to securities, the functions commonly performed by a stock exchange within the meaning of the definitions under the applicable securities laws (*e.g.*, 17 CFR part 240.3b-16).

(k) The term “automated trading system” means an electronic trading system that functions in a manner intended to simulate a securities exchange by electronically matching orders on an agency basis from multiple buyers and sellers such as an “alternative trading system” within the meaning of SEC’s Reg. ATS [17 CFR part 242.300] as such definition may be amended from time to time, or an “automated quotation system” as described in section 3(a)(51)(A)(ii) of the Securities and Exchange Act of 1934 [15 U.S.C. 78c(a)(51)(A)(ii)].

(l) The term “lending of securities” or “loan of securities” shall include securities loans that are structured as repurchase agreements provided, that all terms of the

exemption are otherwise met.

*VI. Effective Dates*

(a) This exemption is effective on January 2, 2007.

(b) PTEs 81-6 and 82-63 are revoked effective January 2, 2007.

Signed at Washington, DC, this 2nd day of March, 2022.

**Ali Khawar,**

*Acting Assistant Secretary,*

*Employee Benefits Security Administration,*

*U.S. Department of Labor.*

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